Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THEODORE H. FRIEDMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court rule governing the reciprocal discipline of attorneys may authorize the federal court to dispense with the independent consideration of a state-court record prescribed by this Court's decisions and instead mandate that such discipline be imposed unless the attorney proves by "clear and convincing evidence" that the state-court proceeding is flawed.

2. Whether the proof supporting the discipline of an attorney in a federal court must be established by "clear and convincing evidence" rather than by a "preponderance of the evidence."

3. Whether an attorney who settled a disciplinary proceeding in a federal court with a disposition under which he was told that withdrawn charges would not be the basis of "other proceedings" against him may be suspended in the same federal court eight years later based on a state-court disbarment resting, in large part, on the withdrawn charges.

LIST OF PARTIES

The parties to this proceeding are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Theodore H. Friedman, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 51 F.3d 20 (2d Cir. 1995), and is reproduced at Pet. App. A, pp. 1a-7a, *infra*. The order of the United States District Court for the Southern District of New York is not reported, and is reproduced at Pet. App. C, pp. 10a-11a, *infra*. The order of the New York Court of Appeals dismissing petitioner's appeal from his disbarment is reported at 83 N.Y.2d 888, 635 N.E.2d 295 (1994), and is reproduced at Pet. App. D, pp. 12a-13a *infra*. The decision of the Appellate Division of the Supreme Court of New York in the same matter is reported at 196 A.D.2d 280, 609 N.Y.S.2d 578 (1994), and is reproduced at Pet. App. E, pp. 14a-38a, *infra*. The report of the special referee of the Department Disciplinary Committee of the Appellate Division in that matter is unreported and is reproduced at Pet. App. F, pp. 45a-70a, *infra*.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was issued on March 28, 1995. A timely petition for rehearing and suggestion for rehearing en banc was denied by that court on June 2, 1995 (Pet. App. B, pp. 8a-9a, *infra*). On August 10, 1995, Justice Ginsburg granted an extension of time for filing a petition for certiorari to and including September 29, 1995. On September 14, 1995, Justice Ginsburg granted a second extension to and including October 27, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 4 of the Rules of the United States District Court for the Southern District of New York is reproduced in Pet. App. G, pp. 71a-74a, *infra*.

STATEMENT

1. Unproved Allegations Are Made Against Mr. Friedman.

Petitioner, a graduate of the University of Michigan and Harvard Law School, was a highly respected and successful personal-injury attorney who practiced in federal and state courts in New York since 1957. He twice successfully argued before this Court.[1] In his 37 years of active practice, he was counsel in almost 50 reported appellate opinions of the federal and New York courts, and he conducted over 200 jury trials.

Among his recent publicized trial victories were jury awards of $10 million and $12 million against New York City and $58 million in an automobile accident case. He was described by the New York referee in this case as "a lawyer of exceptional abilities and energies who has risen to the top of his profession" and was "considered by his peers to be one of the finest, if not the finest, personal injury trial lawyer in New York." Pet. App. F, p. 69a.

In 1987, a state indictment was filed against Mr. Friedman accusing him of suborning perjury in the trial of *Estate of Krieger v. City of New York*, Index No. 6228/80,

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[1] *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963); *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

in which he represented the estate of a man who had died from falling down the shaft of an improperly maintained elevator in a building owned by New York City. Following a jury trial held in November 1988, lasting four weeks, the jury deliberated for three hours before returning a not guilty verdict. The jury also called a press conference and issued a statement asking that the prosecutor be disciplined for bringing the case.

Mr. Friedman had also been trial counsel for the plaintiff in *Mowen v. Yangming Marine Transport Co.*, 78 Civ. 5537 (PNL) (the "*Mowen* case"), a case tried in United States District Court for the Southern District of New York in February 1982. The jury in that case returned a verdict of more than $1.9 million for Mr. Friedman's client. After the verdict was returned, a plaintiff's exhibit that had been offered but was not admitted into evidence was found in the jury room. The district judge conducted an inquiry into this matter, and petitioner submitted an affidavit stating that the gathering of exhibits for delivery to the jury room had been done by his co-counsel. Following an evidentiary hearing, the district judge disbelieved petitioner's sworn denial of personal responsibility.

A disciplinary proceeding was then initiated in the United States District Court for the Southern District of New York. It concluded with an acknowledgment by Mr. Friedman that his affidavit regarding the conduct of co-counsel had been made without personal knowledge or factual basis, but with vigorous denials of any other culpability. On this ground a letter of censure was issued to petitioner on June 23, 1986. The then-chairman of the Grievance Committee for the Southern District of New York — Judge Vincent L. Broderick — wrote in his letter to Mr. Friedman: "We recognize, of course, that given the admission to the second charge in lieu of a full hearing on

all the charges, those other charges may not be the basis of other proceedings against you" (Pet. App. H, p. 76a, *infra*).

2. Mr. Friedman Is Disbarred in New York.

Notwithstanding the definitive jury verdict and the agreed-upon conclusion of the federal disciplinary proceeding, the Department Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York, First Department, filed a complaint in July 1990 against Mr. Friedman making six allegations concerning the *Mowen* case and eleven allegations concerning the *Krieger* case.[2] An extended evidentiary hearing was held before a special referee. There were conflicts in testimony and sharp disagreements at the hearing on the following issues, *inter alia*:

(a) With respect to the *Mowen* case, Mr. Friedman testified that he had not sent the disputed exhibit to the jury room and that his affidavit reflected his good-faith belief that co-counsel was responsible. (b) With respect to the *Krieger* case, Mr. Friedman submitted expert testimony from, among others, Professor Geoffrey Hazard that his actions in failing to correct a witness' testimony on what he believed to be a collateral issue were proper. (c) On the charge that he had asked a witness in the *Krieger* case to testify falsely, both Mr. Friedman and the witness denied that Mr. Friedman's statements to the witness in pretrial preparation sessions had been requests that he commit perjury. (The witness, it must be noted, had at the time of his pretrial meetings with

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[2] Six charges were also based on a third case — *Hill v. Soley*, Index No. 18762/80. Since those allegations were rejected by the referee after the evidentiary hearing and were never considered thereafter, they are now irrelevant.

petitioner been *cooperating* with prosecutors investigating whether petitioner or his private investigator was engaged in subornation of perjury. Hence he was not biased in favor of Mr. Friedman.)

Mr. Friedman argued that the correct standard for the Disciplinary Committee's burden of proof was "clear and convincing evidence," but the referee rejected that argument. Explicitly applying a preponderance-of-the-evidence standard, the referee found that 14 of the 23 counts in the disciplinary complaint had been proved. The referee's conclusions were at odds with the jury's verdict in the criminal prosecution relating to the *Krieger* case. The referee also considered and recommended discipline based on the contested allegations in the *Mowen* case. The referee recommended that Mr. Friedman be suspended from the practice of law for two years.

The Appellate Division affirmed the referee's factual findings, holding that in New York it had been "conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence." *In re Friedman*, 196 A.D.2d 280, 295, 609 N.Y.S.2d 578, 586 (1st Dep't 1994). The court ruled, however, that the recommended two-year suspension was "far too lenient" because, in the court's view, the case involved "several acts of intentional dishonesty." It concluded that "the only just punishment" was disbarment. On May 5, 1994, the New York Court of Appeals dismissed petitioner's appeal from that judgment for want of a substantial constitutional question. *In re Friedman*, 83 N.Y.2d 888, 635 N.E.2d 295 (1994). This Court denied certiorari on October 3, 1994. *In re Friedman*, 115 S. Ct. 81 (1994).

3. This Court Disbars Mr. Friedman.

On the same day on which it denied the petition for a writ of certiorari from the New York disbarment this Court entered an order suspending Mr. Friedman from practice and requiring him to show cause why he should not be disbarred. *In re Friedman*, 115 S. Ct. 48 (1994). Following receipt of a response from Mr. Friedman, this Court issued an order on December 5, 1994, disbarring Mr. Friedman. *In re Friedman*, 115 S. Ct. 629 (1994).

4. Mr. Friedman Is Disciplined in Federal Court.

After the decision by the Appellate Division but before the dismissal of petitioner's appeal to the New York Court of Appeals, the chairman of the Grievance Committee for the Southern District of New York (Patterson, J.) directed Mr. Friedman to show cause by May 4, 1994, why he should not be disciplined pursuant to Rule 4(d) of the rules of the Southern District. By letter delivered on May 4, 1994, Mr. Friedman's counsel (Marvin Frankel, Esq.) advised Judge Patterson that an appeal to the New York Court of Appeals was pending and that a stay had been granted by a judge of the Court of Appeals. The letter requested that the federal disciplinary proceeding be held in abeyance. The letter also noted that four of the counts underlying the New York disbarment involved the same conduct that had been the subject of Judge Broderick's letter of June 23, 1986. Counsel's letter summarized the issues that were presented by the case — including the issue of the proper standard of proof — and advised Judge Patterson that if the Grievance Committee "desire[d] a different procedure, we stand ready to respond in any manner directed" (Pet. App. I, p. 84a, *infra*).

Two days later, Mr. Friedman's counsel advised Judge Patterson by letter that the New York Court of Appeals had dismissed the appeal and that a petition for certiorari was going to be filed "with all possible speed" (Pet. App. J, p. 86a, *infra*). The Grievance Committee did not respond to either of counsel's two letters.

On May 26, 1994, Judge Patterson issued an order directing (Pet. App. C, p. 11a, *infra*)

> that respondent be suspended from practice in the United States District Court for the Southern District of New York until such time as he is reinstated to practice law in the State of New York.

Since the New York disbarment was not yet final by May 26, 1995[3] — petitioner's counsel having filed on April 2, 1994, a motion for reargument with the Appellate Division which was denied on June 7, 1994 — and since a petition for certiorari was about to be filed with this Court, Mr. Friedman's counsel filed a "Motion for Hearing or Rehearing" with Judge Patterson on June 9, 1994. The District Court never ruled on that motion.

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[3] In its brief to the Court of Appeals for the Second Circuit, the respondent acknowledged that the state disbarment order was "still non-final at the time of issuance of Judge Patterson's May 26 order." Brief of Petitioner-Appellee, Second Circuit No. 94-7671, p. 11 n. 4.

5. The Second Circuit Affirms.

The court of appeals affirmed the district court's suspension order. It concluded that the requirements of Rule 4 had been satisfied by the procedure followed by the district court. The letter delivered on May 4 to Judge Patterson advising of the pendency of further appeals and stating counsel's readiness "to respond in any manner directed" was said by the court of appeals to be "a demand for an extension of time which the district court was in no way obligated to grant" (Pet. App. A, p. 6a, *infra*).[4] The panel declared that since the district court had before it the May 4 letter and an appended copy of the memorandum counsel had submitted to the New York Court of Appeals, Mr. Friedman had been accorded the "opportunity to be heard" prescribed by Southern District Rule 4(d).

The court of appeals held that Mr. Friedman had failed to prove "by clear and convincing evidence" — as prescribed in Rule 4(g) — that "the New York procedures were wanting" (Pet. App. A, p. 6a, *infra*). The court relied on the fact that this Court — which, it said, was following "precisely the procedures employed by the Southern District" (*id.*) — had also disbarred Mr. Friedman. The court rejected Mr. Friedman's contention that the district court could not suspend him on the basis of findings that had never been supported by "clear and convincing" evidence.

Finally, the court of appeals rejected Mr. Friedman's argument that the discipline imposed by Judge Patterson punished him for the same conduct that Judge Broderick had promised, in 1986, would not be "the basis of other proceedings" against him. The court said that this argument

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[4] Judge Patterson had not, however, ever expressly denied any request for extension of time.

would "have more force" if the *Mowen* allegations had been the only basis for the suspension in federal court. Since, in the court's view, there were "other serious and substantiated charges" before the district court — *i.e.*, the *Krieger* allegations — the suspension was affirmed.

REASONS FOR GRANTING THE WRIT

I

SOUTHERN DISTRICT RULE 4(g) CONFLICTS WITH DECISIONS OF THIS COURT AND WITH RULINGS OF OTHER CIRCUITS

A line of decisions by this Court has established the principle that attorney discipline in a federal court is to be decided on its own merits and is not to follow automatically from discipline by a state court. The standard prescribed by Rule 4(g) of the Rules of the United States District Court for the Southern District of New York conflicts squarely with this Court's line of decisions because it imposes on the accused attorney the burden of establishing "by clear and convincing evidence" that the discipline imposed by the state court is erroneous. In this case, the court below invoked that standard — which is also specified *in haec verba* in the Rules of the Eastern District of New York and one other federal district court and appears, in modified form, in the rules of 41 other federal district courts — peremptorily to bar Mr. Friedman from federal court because he had been disbarred by the New York court.

A. The Conflict With This Court.

While federal courts typically require that an attorney be a member of a state bar in order to be admitted to the federal bar, expulsion from a federal court's bar does not follow automatically from disbarment by a state. "Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court." *In re Ruffalo*, 390 U.S. 544, 547 (1968). In *Theard v. United States*, 354 U.S. 278, 281 (1957), this Court explained that "[w]hile a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."

Accordingly, when a federal court becomes aware that an attorney has been disbarred by a state court, the federal court is "obligated to determine for itself the facts of the attorney's conduct and whether that conduct had been so grievous as to require disbarment." *In re Ruffalo*, *supra*, 390 U.S. at 553 (White, J., concurring in the result).

Southern District Rule 4(g) conflicts with the direction of the *Ruffalo* and *Theard* decisions. Although it utilizes the language of *Selling v. Radford*, 243 U.S. 46 (1917) (which discussed how this Court should treat state-court findings of attorney misconduct for purposes of membership in the Supreme Court Bar), it reverses the burden of persuasion that this Court contemplated in *Selling*, *Ruffalo* and *Theard*. Far from requiring the federal court to give "intrinsic consideration" of the record and to "determine for [itself]" whether discipline is warranted (*see Selling*, 243

U.S. at 51), Rule 4(g) imposes on the attorney the burden of proving, *by clear and convincing evidence*, that the state disciplinary proceeding was invalid or that the evidence was insufficient.

This reversal of the burden relieved the Grievance Committee in this case of any obligation whatever. The district court and the court of appeals failed to exercise the duties assigned by *Selling*, *Theard* and *Ruffalo* and, instead, as directed by the erroneous "clear and convincing" requirement of Rule 4(g), ministerially and mechanically imported the disbarment order of the New York state court into the separate and independent jurisdiction of the federal district court.[5] Mr. Friedman was suspended indefinitely in the federal district court not because the district court "determine[d] for itself the facts of the attorney's conduct and whether that conduct had been so grievous as to require disbarment" (390 U.S. at 553), but *only* because the state court had disbarred him and his counsel's letter to Judge Patterson failed to meet the "clear and convincing" burden imposed by Rule 4(g). Moreover, this Court's disbarment of Mr. Friedman was not a reason to affirm the district court's order. Rule 8.1 of this Court's Rules governs disbarment in this Court, which is the revocation of a privilege that the Court may readily withdraw from any attorney who is disciplined by a local bar. Membership in the bar of a federal district court is a more basic right that may not as readily be denied.

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[5] The reversal of the burden was compounded in this case by the fact that Mr. Friedman was in effect compelled to demonstrate clearly and convincingly the infirmity of charges that had never been proved by clear and convincing evidence — the normal standard for attorney disciplinary proceedings. *See* pp. 14-20, *infra*.

B. The Conflict With the Tenth and Eleventh Circuits.

The Tenth Circuit has said that in reciprocal disciplinary cases "it is the responsibility of the district court to virtually sit de novo in review of the state court proceedings except for hearing and considering anew live testimony, and to *independently* test the district court rule against the state findings of fact." *In re Phelps*, 637 F.2d 171, 176 (10th Cir. 1981). In emphasizing that the federal district court's review must be *independent* and must not be tilted against the attorney by a presumption of validity, the Tenth Circuit instructed its district courts to "engage in an intrinsic consideration of the state record and determine whether the attorney was denied due process in the state procedure, whether the record lacks clear and convincing factual proof of misconduct, or whether there exists some other grave reason which would render application of the state court penalty an injustice." *Id.* Similarly, in *Greer's Refuse Servs., Inc. v. Browning-Ferris Indus.*, 782 F.2d 918 (11th Cir. 1986), the Eleventh Circuit also required that independent or "intrinsic" consideration be given to a state-court disbarment record. In the case of Mr. Friedman, the district court engaged in no such "consideration," and the Second Circuit confirmed that summary process because of the legally dubious language of Rule 4(g).[6] This Court should grant certiorari to resolve the conflict concerning

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[6] Indeed, in *In re Gouiran*, 58 F.3d 54 (2d Cir. 1995), the Second Circuit reaffirmed the very limited role it saw for federal district courts in "reciprocal discipline" cases. Although it appeared plain from the "exceptional circumstances" recited in the *Gouiran* opinion (58 F.3d at 58) that suspension by the federal court would serve no rational purpose, the Second Circuit felt compelled by the language of Rule 4(g) to declare that if the district court stated that Gouiran failed to satisfy the "clear and convincing" standard, his disbarment would have to be affirmed.

reciprocal attorney discipline between the Second Circuit and the Tenth and Eleventh Circuits.

C. The Question Is Important.

Two federal jurisdictions emulate the Southern District of New York and impose on a lawyer seeking to avoid disbarment the duty of proving, by "clear and convincing evidence," that a state disbarment order is erroneous. Forty-one federal courts permit an attorney to remain a member of the district court bar only if the state's disciplinary proceeding "clearly appears" or is "clearly demonstrated" to be invalid. Six district courts have rules that purport to discipline an attorney automatically if discipline has been imposed by another court. The remaining federal district courts, consistent with this Court's holdings in *Theard* and *Ruffalo*, use neither the "clear" nor "convincing" term in describing the disciplined lawyer's burden. *See* Pet. App. K, pp. 88a-94a, *infra*, which lists the rules in the various federal district courts. The Court should take this case to resolve the conflict among the circuits and establish a uniform rule, consistent with its past decisions, for the federal courts. Lawyers in different parts of the country should not be subjected to different standards of eligibility to continue as lawyers in federal courts.

II

THE SECOND CIRCUIT'S RELIANCE ON A DISBARMENT PROVED BY ONLY A "PREPONDERANCE OF THE EVIDENCE" CONFLICTS WITH OTHER CIRCUITS AND SHOULD BE DISAPPROVED

The courts below also erred in failing to require that the proof against Mr. Friedman be "clear and convincing."[7] Federal courts have long recognized that the power to discipline should be exercised with restraint under procedural safeguards that ensure fairness to members of the bar whose livelihoods and reputations are at stake. This Court has stressed that an attorney does not "hold [office] as a matter of grace and favor" and that his right to appear before a court is not "revocable at the pleasure of the court." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1867). "[I]t is the duty of the court to exercise and regulate [the power to disbar] by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *In re Secombe*, 60 U.S. (19 How.) 9, 13 (1857). Central to the safeguards afforded

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[7] Although the term "clear and convincing" is central to both of the first two questions presented in this petition, the issues are significantly different. Our first question challenges the Southern District's assignment of a burden to Mr. Friedman to prove, by "clear and convincing evidence," that the New York disbarment was flawed. The second question relates to the Grievance Committee's burden and contends that most other federal courts have prescribed that evidence must be "clear and convincing" to justify the disbarment, suspension or other discipline of an attorney. We urge the Court to reject the "clear and convincing" term as applied to the first issue and to rule that, with regard to the second issue, "clear and convincing evidence" is required.

attorneys in the disciplinary process is the requirement of "clear and convincing" proof.

We recognize that this Court, in denying certiorari in Mr. Friedman's state disbarment proceedings, has declined to consider whether the "clear and convincing" standard is constitutionally mandated for all disbarment proceedings, state and federal.[8] In its current posture, however, the case presents the issue of the standard of proof in a different light. Petitioner has now been disbarred by a federal court. Whether or not the Constitution requires this Court to impose a particular standard of proof on the states, the Court clearly has supervisory authority to determine an appropriate, uniform standard of proof for federal disciplinary proceedings.[9] Because the Second Circuit's approval of the disbarment of an attorney who has never been found in any forum to merit such punishment by "clear

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[8] There are holdings of state courts of last resort and federal courts of appeals that indicate that the "clear and convincing" standard is in fact constitutionally mandated. *See Netterville v. Mississippi State Bar*, 397 So. 2d 878, 884 (Miss. 1991); *In re Williams*, 464 A.2d 115, 118-19 (D.C. 1983); *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992). Although the Court declined to address the constitutional issue in denying Mr. Friedman's prior petition, we note that this Court's grant of certiorari in *In re Ruffalo, supra*, came when the case was in a procedural posture similar to that of this case now. This Court denied Ruffalo's petition for certiorari from the Supreme Court of Ohio's suspension order, *see Ruffalo v. Mahoning County Bar Ass'n*, 379 U.S. 931 (1964), but then granted certiorari to review the Sixth Circuit's disbarment based upon the Ohio Supreme Court's order. *In re Ruffalo*, 389 U.S. 815 (1967). It proceeded to review whether the state court proceedings on which the Sixth Circuit's order was based comported with due process. *See Ruffalo, supra*, 390 U.S. at 546-52.

[9] *See generally Frazier v. Heebe*, 482 U.S. 641 (1987).

and convincing evidence" conflicts with the standards selected by other circuits for disbarment in the federal courts, this Court should now grant certiorari to consider this issue, notwithstanding its earlier denial.

A. There Is a Conflict Among the Circuits.

Based on the principles of fairness and restraint that this Court has held should govern disbarment proceedings, at least five federal courts of appeals have held that a federal court or agency may disbar or suspend from practice only on proof of misconduct by "clear and convincing evidence." In 1950, the Seventh Circuit said that in federal disciplinary proceedings "the charges must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent." *In re Fisher*, 179 F.2d 361, 369 (7th Cir.), *cert. denied*, 340 U.S. 825 (1950). The Seventh Circuit explained its reasoning, quoting from *In re Donaghy*, 402 Ill. 120, 123, 83 N.E.2d 560, 562 (1948):

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. . . . The court should, therefore, disbar in moderation. . . . A removal of an attorney from practice for a period of years entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers. In the meantime, his income and livelihood have ceased to exist.

179 F.2d at 370.

The D.C. Circuit has also held that "clear and convincing evidence" — or some similar intermediate standard of proof beyond a mere preponderance — is required in federal judicial or administrative proceedings leading to the disbarment or suspension of attorneys. *Charlton v. FTC*, 543 F.2d 903 (D.C. Cir. 1976). The Federal Circuit followed the D.C. Circuit in *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053 (Fed. Cir. 1987). The Fifth Circuit has also insisted that the "clear and convincing" standard is applicable to disbarment or suspension of attorneys in the federal system. "In attorney suspension and disbarment cases, the charges must be sustained by clear and convincing proof." *In re Thalheim*, 853 F.2d 383, 389 n.9 (5th Cir. 1988); *accord, NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 708 (5th Cir. 1990), *aff'd*, 501 U.S. 32 (1991). In *In re Medrano*, 956 F.2d 101 (5th Cir. 1992), the Fifth Circuit reversed a district court disbarment order based on a mere preponderance of the evidence, holding that "a federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." *Id.* at 102. Finally, the Tenth Circuit in *In re Phelps, supra*, has held that a federal court must consider whether evidence of attorney misconduct satisfies the "clear and convincing" standard even where, as here, a state court has already disbarred the attorney. 637 F.2d at 176.

This Court's previous recognition of the grave consequences of attorney-disciplinary proceedings warrants the imposition of heightened standards of proof in such proceedings. The Court has recognized that "[t]he intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal' and 'convincing'" is "typical[ly]" used "in civil cases involving allegations of fraud or some other quasi-criminal

wrongdoing by the defendant," because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money." *Addington v. Texas*, 441 U.S. 418, 424 (1979). As the Court stated in *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (citations omitted):

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." . . . [T]he Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."

The use of the "clear and convincing" standard in attorney-discipline cases also accords with the uniform practice of the federal courts in addressing analogous issues of similar gravity and consequence. For example, the courts of appeals have unanimously held the "clear and convincing" standard applicable to civil contempt cases. *See, e.g., Gemco Latinoamericano, Inc. v. Seiko Time Corp.*, 61 F.3d 94 (1st Cir. 1995); *King v. Allied Vision, Ltd.*, No. 94-7409, 1995 U.S. App. LEXIS 26193 (2d Cir. Sept. 15, 1995); *Roe v. Operation Rescue*, 54 F.3d 133 (3d Cir. 1995); *In re General Motors Corp.*, 61 F.3d 256 (4th Cir. 1995). As in attorney-discipline cases, individuals subject to civil contempt are being sanctioned for violating judicially imposed standards of behavior. Similarly, the courts of appeals have held that the exercise of a federal court's inherent power to sanction a litigant for bad-faith litigation conduct by imposing a default judgment or an attorney fee award is constrained by the "clear and convincing" standard

of proof. *See, e.g., Shepherd v. ABC, Inc.*, 62 F.3d 1469 (D.C. Cir. 1995) (default) (citing cases); *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287-88 (10th Cir. 1986) (attorney fees).

B. The Issue Is Important.

In holding that the "clear and convincing" standard need not be satisfied in disbarment proceedings, the Second Circuit aligns itself with the minority of state courts that have held that the preponderance-of-the-evidence standard may be used in attorney-disciplinary proceedings. *See In re Capoccia*, 59 N.Y.2d 549, 453 N.E.2d 497 (1983); *In re Walton*, 676 P.2d 1078 (Alaska 1983), *appeal dismissed*, 469 U.S. 801 (1984). The Second Circuit's acceptance, for disciplinary proceedings in the federal courts within the circuit, of an evidentiary standard lower than that held to be required by five other circuits presents a conflict on a question of great importance to members of the bar, warranting resolution by this Court.

Even beyond the direct conflict among the courts, the weight of the consensus behind the "clear and convincing" standard — adopted by the great majority of the states, the ABA Model Rules for Lawyer Disciplinary Enforcement, and five federal courts of appeals — lends further force to the argument that this Court should prescribe it as the standard for the federal courts. This Court need not, of course, hold that the clear and convincing standard is constitutionally compelled. The choice of a standard to be applied in the federal courts is a matter for the federal courts

— and ultimately for this Court — to determine.[10] The weighty interests at stake for the individual affected by a disbarment proceeding, the "quasi-criminal" nature of that proceeding, *see In re Ruffalo*, *supra*, 390 U.S. at 551, and the substantial judicial consensus behind the "clear and convincing evidence" standard combine to support selection of that standard to govern the federal courts.[11]

In approving a lower standard of proof, the Second Circuit is out of step with the weight of judicial opinion in this country. As shown in Appendix L, pp. 95a-101a, *infra*, 40 states and the District of Columbia currently require "clear and convincing" proof or some comparable, greater-than-preponderance standard in attorney-discipline cases. This judicial consensus on the appropriate standard of proof is also reflected in the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement (ABA/BNA 1993), which provide in Rule 18(c) that "*[f]ormal charges of misconduct*, lesser misconduct, petitions for reinstatement

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[10] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) ("Where Congress has not prescribed the appropriate standard of proof and the Constitution does not dictate a particular standard, we must prescribe one."); *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (in the absence of a statute establishing the standard of proof for a particular proceeding "this Court has felt at liberty to prescribe the standard, for '[i]t is the kind of question which has traditionally been left to the judiciary to resolve'" (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966))).

[11] See this Court's opinion in *Vance v. Terrazas*, 444 U.S. 252, 266 (1980), in which the Court explained that its "decided preference for requiring clear and convincing evidence" in expatriation cases led it to impose that standard in the absence of a statute in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), despite the fact that, as held in *Vance*, the Constitution does not require the use of that standard in such proceedings when Congress has dictated otherwise.

and readmission, and petitions for transfer to and from disability inactive status *shall be established by clear and convincing evidence*" (emphasis added). Only ten states deviate from this standard and permit an attorney to be suspended or disbarred based on a finding of misconduct supported by a mere preponderance of the evidence. The substantial agreement among the courts on the use of this standard powerfully supports its selection to govern federal disciplinary proceedings. *See, e.g., Rivera v. Minnich*, 483 U.S. 574, 578-79 (1987).

III

THE FEDERAL SUSPENSION WAS A SECOND PUNISHMENT FOR PETITIONER'S CONDUCT IN THE *MOWEN* CASE AND VIOLATED AN EXPLICIT ASSURANCE GIVEN BY THE FEDERAL COURT

Mr. Friedman has now been punished twice by the United States District Court for the Southern District of New York for the same acts allegedly committed during the trial of the *Mowen* case in 1982. To be sure, attorney discipline is remedial and an attorney may be disbarred, notwithstanding the Double Jeopardy Clause, after he is found criminally culpable. But two successive disciplinary proceedings by the same court for the same conduct would violate the policies of the constitutional provision as recently expounded in this Court's opinions in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), and *United States v. Halper*, 490 U.S. 435 (1989). The violation is aggravated in this case because Mr. Friedman was explicitly assured, at the termination of the first disciplinary proceeding, that the controverted allegations made at that

time "may not be the basis of other proceedings" against him. See App. H, p. 76a, *infra*.

The court below erroneously rejected this contention on the ground that additional allegations that had not been involved in the *Mowen* case were the basis of the New York disbarment order. The decision of the Appellate Division that rejected the referee's recommended two-year suspension did, however, rely principally on allegations made as a result of the *Mowen* proceedings.[12] And the district court, which issued no opinion or other explanation of its order, never stated whether it would have arrived at the same result if the record consisted only of the evidence pertaining to the *Krieger* allegations. Finally, the constitutional prohibition against Double Jeopardy is not avoided by adding to an allegation for which an individual has once been punished a second allegation of other offenses and then punishing him for both — including the conduct for which he suffered an earlier sanction. *See, e.g., United States v. Dixon*, 113 S. Ct. 2849, 2858 (1993).

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[12] The Appellate Division found the referee's recommendation too lenient and increased the sanction from a two-year suspension to disbarment because, it said, the violations included "the filing of a knowingly false and misleading affidavit, the giving of false testimony at a hearing before then Southern District Judge Pierre N. Leval, and the solicitation of false testimony from a fact witness." 196 A.D.2d at 295, 609 N.Y.S.2d at 586. Two of the three specified violations related to the *Mowen* proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1995

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 975 — August Term, 1994
(Argued: March 15, 1995 Decided: March 28, 1995)
Docket No. 94-7671

In Re: THEODORE H. FRIEDMAN,

GRIEVANCE COMMITTEE FOR THE
SOUTHERN DISTRICT OF NEW YORK,

Petitioner-Appellee,

— v. —

THEODORE H. FRIEDMAN,

Respondent-Appellant.

Before:

MESKILL, CARDAMONE, and ALTIMARI,

Circuit Judges.

Appeal from an Order of Disbarment entered in the United States District Court for the Southern District of New York (Patterson, *J.*).

Affirmed.

MARVIN E. FRANKEL, Kramer, Levin, Naftalis, Nessen, Kamen & Frankel, New York *for Respondent-Appellant.*

DANIEL L. BROCKETT, Squire, Sanders & Dempsey, New York, New York (Hal R. Lieberman, Chief Counsel, Departmental Disciplinary Committee of Appellate Division, First Department, New York, New York), *for Petitioner-Appellee.*

Per Curiam:

Respondent-appellant Theodore H. Friedman appeals from an Order entered in the United States District Court for the Southern District of New York (Patterson, *J.*), suspending him from practice in the Southern District until such time as he is reinstated to practice in the state courts of New York.

Background

Friedman was disbarred from practice in the state courts by order of the New York Appellate Division, First Department, after lengthy disciplinary hearings culminating in the finding, by a Special Referee, that he had engaged in professional misconduct. As a result, Judge Patterson, as Chairman of the Southern District Grievance Committee, entered an Order to Show Cause on April 4, 1994, directing respondent to demonstrate why reciprocal discipline should not be imposed pursuant to Southern District General Rule 4(d). The order gave Friedman thirty days in which to respond. On the thirtieth day, his counsel wrote to the

district court asking for a stay of federal disciplinary proceedings, pending the outcome of his request for leave to appeal to the New York Court of Appeals. In his letter, counsel also advanced two substantive arguments in opposition to the suggestion that reciprocal discipline would be appropriate.

The first of these arguments was that the federal courts were constitutionally required to employ a higher standard of proof of misconduct in disbarment proceedings than that employed by the New York courts. New York requires proof by a preponderance of the evidence. The second argument rested on preclusion principles. We summarize the facts upon which the preclusion theory was based.

In the early 1980s, Friedman tried a personal injury case in the Southern District of New York before then-district Judge Leval. After the jury returned a verdict for Friedman's client, it was discovered that an unreceived exhibit had made its way into the jury room. Friedman submitted an affidavit to the district court in which he laid the blame on co-counsel who, because he was out of the country at the time, was unaware of the post-verdict proceedings. Following a hearing at which he heard testimony, Judge Leval published an opinion in which he found that respondent had willfully tampered with the evidence. *See Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F. Supp. 367, 389-85 (S.D.N.Y. 1982), *modified on other grounds*, 563 F. Supp. 224 (S.D.N.Y. 1983).

Respondent was subsequently charged with four counts of professional misconduct by a panel appointed by the Committee on Grievances of the Board of Judges of the Southern District of New York to investigate the matter.

Pursuant to an agreement, respondent admitted to having filed a false and misleading affidavit. In exchange, the Committee agreed to drop the other charges. In a letter of censure, the Honorable Vincent L. Broderick noted that the remaining three charges had not been the subject of any findings and said, "[w]e recognize, of course, that given the admission to the second charge in lieu of a full hearing on all the charges, those other charges may not be the basis of other proceedings against you." Letter of Hon. Vincent L. Broderick, June 23, 1986 [J. App. at 115.]

The Appellate Division, First Department conducted an independent review of the matter when the same conduct was made the basis of the six counts of wrongdoing referred to its Departmental Disciplinary Committee. All but one count was found to have been established by a fair preponderance of the evidence by the Honorable Donald J. Sullivan, Special Referee. The Special Referee contemporaneously addressed misconduct charges flowing from two other personal injury cases. A total of fourteen charges were sustained by the Special Referee, including the charge of submitting a false affidavit to the federal bench. The Special Referee recommended a suspension of two years as a sanction for Friedman's conduct. Confirming all but one of the Special Referee's findings, the Appellate Division rejected the proposed sanction as too lenient. *In re Friedman*, 196 A.D.2d 280, 609 N.Y.S.2d 578 (1st Dep't 1994) (per curiam). Accordingly, it disbarred him from the practice of law in the state of New York.

After directing Friedman to show cause why reciprocal discipline was inappropriate and after receiving two letter submissions in response, Judge Patterson disbarred him from practice in the Southern District by Order dated May 26, 1994.

Since then, the New York Court of Appeals has dismissed his appeal on the ground that no constitutional issue was presented, 83 N.Y.2d 888, 635 N.E.2d 295, 613 N.Y.S.2d 126 (1994), and the United States Supreme Court has denied his petition for a writ of certiorari, 115 S. Ct. 81 (1994). Furthermore, the Supreme Court has recently disbarred respondent from practice before it, 115 S. Ct. 629 (1994), as a result of the same charges underlying the appealed-from district court Order, *see* 115 S. Ct. 48 (1994) (mem.). In addition, the Appellate Division, First Department effectively denied a motion for reargument that, unbeknownst to Judge Patterson, was pending at the time the district court issued the Order of disbarment. *See* Order of the First Dep't, M-1814. [J. App. at 28.]

Discussion

Friedman claims on appeal that he was denied due process in two ways. He first urges that the district court's order of suspension was premature because he was not afforded a hearing; he also argues that the district court erred in accepting a state court disbarment order based on proof established by a preponderance of the evidence. Finally, Friedman makes the preclusion argument recited above. We reject these contentions.

We first note that Friedman elected to respond to the district court's show cause Order by seeking, on the thirtieth day, a stay. However, his letter submissions contained the substance of reasoned arguments in opposition to the suggestion of disbarment. Further, a copy of the memorandum submitted on Friedman's behalf to the New York Court of Appeals, setting forth his constitutional arguments, was attached to the first of the letters. It is accordingly apparent that these arguments were before the district court when it made its decision. The district court

was also possessed of the knowledge that the New York Court of Appeals had dismissed the direct appeal. Even if the district court had not been apprised of Friedman's theories, however, this Court would not be inclined to intervene. Respondent's approach to the district court's Order to Show Cause was, in essence, a demand for an extension of time which the district court was in no way obligated to grant.

The district court is required to "examine the state proceeding for consistency with the requirements of due process, adequacy of proof and absence of any indication that imposing discipline would result in grave injustice." *In re Jacobs*, 44 F.3d 84, 88 (2d Cir. 1994) (citing *Selling v. Radford*, 243 U.S. 46, 51 (1917)). Friedman reasons that, because the district court did not conduct a hearing, it did not examine the state proceeding as it was bound to do. We reject this premise. The district court had before it the relevant facts and detailed legal arguments, including those that addressed New York's alleged constitutional inadequacies. Despite Friedman's insistence, the Southern District rules do not require a hearing. Rather, they require the "opportunity to be heard." Local Rule 4(d), (g); *see also In Re Jacobs*, 44 F.3d at 90.

As *Selling* makes clear, it was Friedman's burden to demonstrate by clear and convincing evidence that, in this case, the New York procedures were wanting. Friedman was represented by counsel throughout lengthy hearings in which he was able to call his own witnesses, cross-examine and submit legal memoranda and proposed findings of fact. The district court's implicit conclusion that Friedman failed to carry his burden is not erroneous. We find persuasive on this point that the United States Supreme Court, following precisely the procedures employed by the Southern District, has also disbarred Friedman, and implicitly rejected

Friedman's claim that the preponderance of the evidence standard of proof deprived him of due process. We thus join the several courts that have already rejected Friedman's constitutional argument.

We also reject the preclusion argument. Were the *Red Star Towing* arguments the only basis for the state court's disbarment action, and the reciprocal Southern District discipline, this argument would have more force. It is incontrovertible, however, that even absent the grave charges at issue in that proceeding, other serious and substantiated charges remained which amply justify the district court's suspension of Friedman.

Conclusion

For these reasons, the Order of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of June one thousand nine hundred and ninety-five.

FILED
JUN 2 1995

In Re: Theodore H. Friedman,

Grievance Committee For The Southern District Of New York,

Petitioner-Appellee,

v

Theodore H. Friedman,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Theodore H. Friedman.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: / s /
Carolyn Clark Campbell,
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of	:	
Theodore H. Friedman	:	M-2-238
52 Duane Street New York, NY	:	ORDER
	:	
Respondent		

----------x

On March 22, 1994 the Appellate Division, First Department, of the Supreme Court of the State of New York ordered that respondent Theodore H. Friedman be disbarred from practice as an attorney and counselor-at-law in the State of New York. On April 4, 1994 the Grievance Committee of the United States District Court for the Southern District of New York sent an order to respondent directing that he show cause why discipline should not be imposed based on the Appellate Division action.

Respondent has made two submissions to this Court dated May 4, 1994 and May 6, 1994 requesting that this matter be held in abeyance until all appellate avenues have been exhausted. The Respondents appeal to the New York Court of Appeals has been rejected and the order of disbarment of the Appellate Division is final.

In view of the disbarment of respondent in the Appellate Division, First Department and pursuant to rule 4(d) of the General Rules of this Court, it is hereby ordered that respondent be suspended from practice in the United States District Court for the Southern District of New York until such time as he is reinstated to practice law in the state of New York.

SO ORDERED.

/s/
Robert P. Patterson, Jr.
Chairman, Grievance Committee S.D.N.Y.

Dated: New York, New York
May 26, 1994

APPENDIX D

State of New York
Court of Appeals

At a session of the Court,
held at Court of Appeals
Hall in the City of Albany
on the fifth day of May
1994

Present, HON. RICHARD D. SIMONS, Senior Associate Judge, presiding.

Mo. No. 516

In the Matter of Theodore H.
Friedman (Admitted as Theodore
Herzl Friedman), an Attorney and
Counselor-at-Law.
Departmental Disciplinary
Committee for the First
Judicial Department,

Respondent,

Theodore H. Friedman, Esq.,

Appellant.

The appellant having filed notice of appeal and a motion for a stay to the Court of Appeals in the above cause,

papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no appeal lies as of right from the unanimous order of the Appellate Division absent the direct involvement of a substantial constitutional question (*see* CPLR 5601); and it is

ORDERED that the said motion for a stay be and the same hereby is dismissed as academic.

Judges Simons, Titone, Levine, Mercure and Crew concur. Chief Judge Kaye and Judges Bellacosa, Smith and Ciparick took no part.

/s/
Donald M. Sheraw
Clerk of the Court

APPENDIX E

SUPREME COURT, APPELLATE DIVISION

First Department, December 1993

Filed March 22, 1994

Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch,
Israel Rubin, Justices.

In the Matter of Theodore H. Friedman,
(admitted as Theodore Herzl Friedman)
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department, M-2445
Petitioner,

M-5413

Theodore R. Friedman, Esq.,
Respondent.

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on April 1, 1957.

Kenneth M. Bernstein and Jonathan K.M. Crawford,

of counsel (Daniel L. Brockett, Special Trial Counsel, Hal R. Lieberman, attorney) for petitioner

Marvin E. Frankel and Michael S. Ross, of counsel (Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, attorneys) for respondent.

Motion No. 2445
Cross-Motion No. 5413

IN THE MATTER OF THEODORE H. FRIEDMAN, an Attorney

PER CURIAM

Respondent, Theodore H. Friedman was admitted to the practice of law in New York by the First Judicial Department of April 1, 1957 under the name of Theodore Herzl Friedman. At all times relevant herein respondent has maintained an office for the practice of law within the First Judicial Department.

Respondent was served with a Notice and Statement of Charges which allege twenty-three separate counts of professional misconduct stretching over a decade and arising out of respondent's representation of personal injury claimants in three separate matters: (1) *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 (Counts 1-6); (2) *Estate of Miriam Krieger v. City of New York*, Supreme Court, New York County (Index No. 8228/80) (Counts 7-17); and (3) *Hill v. Soley*, Supreme Court, Bronx County (Index No. 18762/82) (Counts 18-23).

Pursuant to 22 N.Y.C.R.R. §§ 603.4(b) and (d), and the Committee Rules, Hon. Donald J. Sullivan was appointed by this Court to serve as Special Referee.

Hearings were held before the Special Referee on twenty-six days commencing on July 1, 1990 and ending on May 22, 1992. The transcript of the proceedings runs over 5,000 pages. Thirty witnesses testified, including two preeminent ethics experts (one for each side). During the course of the hearings the following facts were adduced and conclusions reached.

Mowen v. Yangming Marine Transport Corp. - Counts One-Six

Respondent represented the plaintiff Lorraine Mowen in a wrongful death action arising out of a ship collision in which her husband, Dennis Mowen, lost his life. The respondent was assisted in this matter by his then partner, Jethro M. Eisenstein and by Frederick J. Cuccia of the firm of Cuccia and Oster. The trial took place before the Hon. Pierre N. Leval of the United States District Court of the Southern District of New York in late 1981 and early 1982. During the trial, a report by an expert called by respondent was marked for identification, as PX-337(b). Judge Leval would not allow PX-337(B) in evidence, but ruled that the respondent could use it argumentatively in his summation. After the jury commenced their deliberation a note was received from them requesting the trial exhibits. The trial court instructed the exhibits in evidence be collected and delivered to the jury and repeated the admonition about Exhibit 337(B) which was used in summation but was not in evidence in chief. Thereafter, the jury returned a verdict in favor of the plaintiff and shortly after the announcement of the jury's verdict, it was discovered that PX-337(B) had been given to the jury. Respondent thereafter submitted an

affidavit, sworn to March 8, 1982, in which he placed the entire responsibility for sending PX-337(B) to the jury room on his co-counsel, Mr. Cuccia. Respondent stated that Mr. Cuccia had sent the exhibit into the jury room, in the mistaken belief that it was part of the evidence received. Respondent, however, made no effort to communicate with Mr. Cuccia before submitting this affidavit, casting the blame on him, and no affidavit was submitted by Mr. Cuccia, who as abroad from March 7 to March 17, 1982 and who knew nothing of respondent's affidavit at that time.

After a hearing, in an opinion dated December 3, 1982, Judge Leval found respondent to have engaged in the "willful misconduct of . . . tampering with the evidence transmitted to the deliberating jury." Judge Leval stated that respondent had "surreptitiously includ[ed] among the exhibits to be sent to the jury an exhibit marked for identification that he well knew had not been received in evidence." Judge Leval concluded than when the jurors were deliberating and asked for all evidence in the case, respondent caused the exhibit to be sent to them "intentionally and with full awareness that it was in violation of the court's order and rulings as to the receipt of the exhibit." Judge Leval rendered an opinion that based upon the transcripts respondent had lied during the hearing claiming that he had left the courtroom for lunch and had entrusted his co-counsel, Mr. Cuccia, to handle the exhibits that were sent to the jury. (*Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F. Supp 367 at 382-386 [1982]).

Pursuant to a letter of complaint from Judge Leval, four separate charges were filed against respondent in a Federal Disciplinary Proceeding. Thereafter, at the Federal disciplinary hearing on January 9, 1985, respondent, pursuant to a plea bargain agreement, admitted the second charge, namely that he prepared, swore and caused to be

served an affidavit without personal knowledge of the facts therein, in exchange for dismissal of the other federal disciplinary charges. On November 4, 1985, the Committee on Grievances of the Southern District recommended a sanction that a formal letter of reprimand be issued to respondent and that this letter be made a matter of pubic record. A subsequent letter of censure was written and distributed by Judge Vincent L. Broderick, Chairman of the Committee on Grievances on June 23, 1986.

Thereafter, the Departmental Disciplinary Committee filed a petition in this Court seeking the imposition of reciprocal discipline pursuant to 22 N.Y.C.R.R. § 603.3. Respondent objected to the imposition of discipline greater than that imposed by the federal disciplinary committee. By order entered February 20, 1987, this Court denied the Committee's petition and directed that the *Mowen* matter be referred to the Departmental Disciplinary Committee "for investigation and hearings, if necessary, as to *all the issues raised.*"

Count One

The essential elements of Count One are the respondent intentionally caused to be placed into the jury room, during deliberations, an exhibit (PX-337B) when he knew that same had not been received in evidence, and the placing of said exhibit was done with full awareness that it was in violation of the Court's order and ruling as to the receipt of the exhibit in evidence.

Viewing all of the evidence under a "fair preponderance" standard, the Special Referee found that the Committee had failed to establish that respondent intentionally sent exhibit 337(b) to the jury room. Count One was not sustained.

Count Two

This Count concerned false statements made by respondent in his affidavit dated March 8, 1982, which respondent prepared, swore and caused to be filed in the *Mowen* action in response to the post-trial motion concerning the discovery of the unautorized exhibit in the jury room. Specifically, respondent was charged with swearing to facts, to wit, that Cuccia was responsible for sending the unauthorized exhibit into the jury room, about which he had no personal knowledge or factual basis, direct or indirect. Thus, it was alleged that respondent violated DR1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR1-102(A)(6) (engaging in conduct that adversely reflects on his fitness to practice law) and DR7-106(C)(1) (stating or alluding to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence).

The essential elements of Count Two, except for slight modification, are word-for-word identical to the second charge issued by the Federal Grievance Committee to which respondent admitted and for which he was sanctioned. Relying on that admission by respondent, the Special Referee sustained Count Two.

Counts Three and Four

Count Three alleges that respondent acted with *reckless disregard* for the truth in making false statements about Cuccia in his March 8, 1982 affidavit without making any effort to verify them with Cuccia. As a result of his actions respondent was charged with violating DR1-102(A)(5) and DR1-102(A)(6).

In the alternative, Count Four alleges that respondent *knowingly* made false statements in his affidavit dated March 8, 1982. As a result, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(5) (knowingly making a false statement of law or fact in his representation of a client), DR7-102(A)(6) (participating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false), and DR7-102(A)(8) (knowingly engaged in other illegal conduct or conduct contrary to a Disciplinary Rule during his representation of a client).

Respondent's admission to the second Federal disciplinary charge that he had no personal knowledge or factual basis for asserting in his affidavit that Cuccia was responsible for putting Exhibit 337B in the jury room and that Cuccia had acted in the good faith belief that it was proper to send in the exhibit was relied upon.

In addition, in May of 1987, respondent waived immunity and testified before a Manhattan grand jury concerning the *Krieger* case. The prosecutor cross-examined respondent on various matters including the affidavit he submitted in the *Mowen* case. During his testimony before the grand jury, respondent admitted that his affidavit blaming Cuccia was false.

In addition to the false statements about Cuccia, it was alleged that respondent's affidavit contained numerous other false or misleading statements or material fact including (i) that Cuccia handled the exhibit marshalling process; (ii) that all of the exhibits going to the jury were made available to counsel; (iii) that defense counsel had access and opportunity to examine the exhibits before the Clerk moved them into the jury room; (iv) that the Clerk had checked with all counsel as to whether the plaintiffs' exhibits

had been reviewed, and (v) that all counsel had assented before those exhibits were moved into the jury room.

These statements were contradicted by the testimony of others present in the *Mowen* courtroom, who said that respondent was involved in the exhibit marshalling process--and the Clerk of the Court who stated that he relied completely on respondent in connection with the review of exhibits. Respondent's sworn statements in his affidavit about what transpired during the period when the exhibits were being collected are also directly at odds with his subsequent position that he was not present in the courtroom when these events were occurring.

Although alternative counts had been alleged against respondent of recklessly making false statements in his affidavit (Count 3) and knowingly making false statements in his affidavit (Count 4), the Special Referee sustained both charges. The Special Referee concluded that an attorney's submission of an affidavit blaming his co-counsel of so serious an act and purporting to describe his co-counsel's subjective state of mind without making any effort to confirm the truth with co-counsel, is certainly reckless in the circumstances. Based upon respondent's admitted conversation with Cuccia about the exhibit in question not being in evidence and the fact that many of the statements in respondent's affidavit were contradicted by the testimony of others present in the courtroom and the position subsequently taken by respondent, the Special Referee concluded that respondent knowingly made false statements in the subject affidavit.

Count Five

Count 5 concerned respondent's testimony at the July 20, 1982 hearing before Judge Leval held for the express purpose of taking evidence on the subject of the unauthorized exhibit in the jury room. Respondent testified that he was not present in the courtroom during the exhibit marshalling process. Based upon this conduct respondent was charged with intentionally making a false and misleading statement while testifying under oath in violation of DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(5), DR7-102[A][6] [erroneously cited as DR1-702(A)(6)] (participating in the creation or preservation of evidence knowing or when it is obvious that the evidence is false) and DR7-102[A][8] ([erroneously cited as DR1-702(A)(8)] [knowingly engaging in other illegal conduct or conduct contrary to a Disciplinary Rule]).

Upon the evidence presented, the Special Referee found that respondent intentionally made false and misleading statements while testifying under oath and as such sustained Count five.

Count Six

Count six alleges that respondent failed to advise the court of inaccuracies in his affidavit, once having been informed through Mr. Cuccia that portions of the affidavit were inaccurate. As such, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) (concealing or knowingly failing to disclose that which he is required by law to reveal) and DR7-102(A)(6).

The record indicates that Mr. Cuccia returned from Europe on or about March 17, 1982 and when made aware

of the contents of the affidavit submitted by respondent to Judge Leval challenged the contents of the affidavit. At no point prior to, during or subsequent to Judge Level's hearing, did respondent take any steps to inform Judge Leval of Mr. Cuccia's position.

Based upon the evidence presented the Special Referee concluded that respondent knew or should have known of the inaccuracies of the allegations as set forth in the affidavit and in failing to rectify the record he violated the disciplinary rules charged. As such, count six was sustained.

Estate of Miriam Krieger v. City of New York - Counts 7- 17

The respondent represented Miriam Krieger and the Estate of Aaron Krieger in a civil negligence lawsuit filed in Supreme Court, New York County. The plaintiff sought monetary damages for the death of Aaron Krieger, who fell down an elevator shaft on April 4, 1979. Named as defendants in the case were the City of New York which owned the building and Universal Elevator Company which had been retained by the City to maintain the repair of the elevator. Stanton Trading Corporation, a tenant of the building, and Aaron Krieger's employer at the time of his fatal fall, was impleaded as a third-party defendant.

A central issue in the plaintiff's claim against the City was whether the safety devices on the elevator were working properly at the time of Aaron Krieger's death. To establish its defense, the City, represented by Laura Shapiro of the Corporation Counsel's office, intended to call Michael Cohen, a Stanton employee at the time of the accident, to testify about the manner in which Stanton employees operated the elevator.

The respondent retained Mr. Elliot Goldman, a private investigator, to investigate the accident and prepare witnesses for trial. Respondent performed no background investigation of Mr. Goldman prior to retaining him. Mr. Goldman was given authority to compensate witnesses without prior approval from respondent or anyone in respondent's office. Respondent did not give Mr. Goldman any guidelines to follow with respect to the interviewing of witnesses and the taking of statements.

Under the terms of the agreement with respondent, Mr. Goldman was promised only 50% of Goldman's hourly rate on billing but an additional 100% of this rate on accumulated hours if the case was successful.

During the course of the trial, Michael Cohen told Ms. Shapiro that respondent's investigator, Goldman was trying to bribe him. Thereafter, the New York City Department of Law and Department of Investigation commenced an investigation.

Cohen met with Goldman and respondent and secretly tape recorded their conversation. During the course of the conversation respondent asked Cohen to testify falsely about various matters, including whether he had ever met with respondent and whether Cohen had been offered or paid any money.

During the course of the trial, respondent failed to disclose to the court that another witness, Arthur Eilets, had testified falsely about significant credibility matters which respondent knew were false. Eilets also stated to Cohen in tape recorded conversations that respondent had "clued" him to give false testimony about certain substantive issues as well. The case eventually resulted in a mistrial, declared in January 1986.

Arthur Eilets and Elliot Goldman were indicted in February 1986 in connection with these incidents. Goldman was tried and convicted in April 1987 of bribery of a witness and solicitation of perjury. Respondent was also indicted for subornation of perjury and other crimes for his role in the *Krieger* case, but was eventually acquitted of these criminal charges.

Count Seven through Ten

Respondent was charged with soliciting or requesting, Michael Cohen, a prospective witness for the City of New York in the *Krieger* case to (a) give false testimony *at trial* that his only meeting with respondent consisted entirely of the discussion as to whether he, Cohen was required to meet with the Assistant Corporation Counsel (Count 7) and (b) give false testimony *at trial* that no one had paid or had offered to pay Cohen money in connection with his prospective appearance as a witness (Count 8). It was alleged that by his actions, respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4) (knowingly used perjured testimony or false evidence), DR7-102(A)(6) and DR7-102(A)(8).

In the alternative, respondent was charged with a) requesting Michael Cohen, a prospective witness for the City of New York to make false statements *to opposing counsel*, Laura Shapiro of the Corporation Counsel's office, that Cohen's only meeting with respondent consisted entirely of a discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel (Count 9) and (b) requesting Michael Cohen to make false statements *to opposing counsel*, Laura Shapiro, that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a witness (Count 10). As a result it was alleged that respondent violated DR1-102(A)(4),

DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) (concealing or knowingly failing to disclose that which he is required by law to reveal) and DR7-109(A) (prohibits suppression of any evidence that the lawyer or his client has a legal obligation to reveal or produce).

Although Counts 9 and 10 were charged as alternatives to Counts 7 and 8, the Special Referee sustained all four counts. The Special Referee concluded after a reading of the tape and surrounding circumstances that it was clear that respondent was preparing Mr. Cohen to give false testimony at the *Krieger* civil trial. According to the Special Referee, the meeting met the test of coaching and instructing Mr. Cohen as to what to say on the witness stand, and further, offering Mr. Cohen a theory to reconcile any conflicting statements that he may have given.

The Special Referee further found that a direct misrepresentation of material fact to opposing counsel made at the direction of respondent with the intent to induce reliance thereon is unethical professional conduct.

Count Eleven

This count alleges that respondent solicited and requested Michael Cohen to give false testimony that he had been and recalled being present when Wilhemina Oliver, a Manager for the City of New York, was told of dangerous conditions concerning the elevator which was the site of the accident and that she promised to have those conditions corrected. Respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6), DR7-102(A)(8).

The Special Referee concluded that although the evidence submitted in reference to this charge was at times

contradictory, the credible evidence established that respondent asked Mr. Cohen to testify falsely about Wilhemina Oliver, or at least, that respondent asked Mr. Cohen to say things which Cohen did not know or believe to be true. As such, the Special Referee sustained count eleven.

Count Twelve

Count twelve alleges that respondent solicited and requested Arthur Eilets, a witness for the plaintiff in the *Krieger* case, to give false testimony. As a result, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

There was no direct evidence to support this charge. What was relied upon was circumstantial evidence, that is, conversations between Cohen and Eilets, and Goldman and Eilets and the Special Referee found that the essential elements of this Charge were not established by a preponderance of the evidence. As such, count twelve was not sustained.

Count Thirteen

This count alleges that respondent was present when a witness for the plaintiff, Arthur Eilets, gave material false testimony, which respondent knew to be false and he took no steps to reveal the fraud to the Court or the parties. As a result, respondent was charged with violating DR7-102(B)(2) (a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.)

Respondent admits that he knew Eilets was lying when he testified at the *Krieger* trial, however, he did not believe that he was obliged to make some corrective disclosure to the court. Respondent's position was that his duty was excused in this case because Eilets' false testimony went to collateral matters and because it was elicited on cross-examination, as opposed to direct examination, and thus the false testimony was not a fraud upon the Tribunal within the meaning of the disciplinary rule.

Counsel from the Departmental Disciplinary Committee, however, pointed out that Eilets' testimony was pivotal to the respondent's case. Eilets was respondent's lead-off witness, he was on the stand for four days, he was prepared for said testimony by respondent, and was paid $1,900.00 plus a suit and transportation.

The Special Referee concluded that Eilets gave material false testimony which respondent knew to be false and took no steps to reveal said facts to the Court or parties and thus violated DR7-102(B)(2). As such count thirteen was sustained.

Count Fourteen

This count alleges that respondent failed to supervise and give appropriate instructions to his investigator, Elliot Goldman, with respect to, among other cases, the *Krieger* case. It was further alleged that respondent failed to take reasonable remedial action after it became apparent that Goldman was engaged in unethical and illegal behavior. As a result respondent was charged with violating DR1-102(A)(5) and DR1-102(A)(6).

The record indicates that respondent began using Goldman's services as a private investigator in 1979.

Goldman eventually became respondent's primary investigator, working on ninety percent of respondent's cases. Respondent performed no background investigation of Goldman and never discussed any guidelines for conducting interviews of witnesses or compensating them for expenses. A routine background check would have revealed that in 1972 Goldman had been indicted for bribing a witness in a personal injury case and that he had pleaded guilty to a lesser included charge.

Even assuming that respondent had no obligation to do a background check on Goldman, there came a point in time when respondent should have been alerted that Goldman was engaged in questionable activities and he should have taken action. In 1985, Goldman backdated a witness statement in the *Krieger* case and brought this fact to respondent's attention. Respondent was also made aware of the contents of a tape of a November 21, 1985 meeting between Goldman and Cohen wherein Goldman stated that Cohen was delighted with the money and that he [Goldman] can get him [Cohen] to sign anything. Respondent was also aware in February 1986 that Goldman was indicted for bribery of a witness based on the November 21, 1985 meeting with Cohen, yet he continued to use Goldman's services. Respondent claimed that it was not improper to continue to employ Goldman after he was indicted since there was no evidence of misconduct by Goldman after that point.

The Special Referee concluded that once respondent was made aware of Goldman's questionable activities, he had an affirmative duty to take reasonable remedial action to rein in and control Goldman as a private investigator. The Special Referee sustained count fourteen insofar as it alleged that respondent violated DR1-102(A)(5).

Count Fifteen

The count alleges that respondent improperly acquiesced in the payment of compensation to a witness in the *Krieger* case, namely one Arthur Eilets, contingent on the content of Eilets' testimony. Respondent was charged with violating DR7-109(c).

The Special Referee found that the amount of compensation paid to Mr. Eilets appeared to be generous, but he failed to find that the record substantiated the position that the payments were contingent on the contents of Eilets' testimony. As such, count fifteen was not sustained.

Count Sixteen

This count alleges that respondent entered into a contingency fee arrangement with Mr. Goldman, a non-lawyer, under which respondent agreed to pay Goldman an hourly rate and he would receive additional compensation over and above that rate contingent on the success of the litigation. Respondent was charged with violating DR3-102 which prohibits fee splitting with a non-lawyer.

The Special Referee found that it was clear that respondent's fee arrangement with Goldman was contingent on the outcome of the *Krieger* case, and it created an incentive for Goldman to make that outcome eventually beneficial to him and created the incentive to influence the testimony of a witness. As such, the Special Referee sustained count sixteen.

Count Seventeen

This count alleged that respondent offered and paid, and acquiesced in the payment of, unreasonable and

excessive sums of money and other benefits to witnesses and prospective witnesses, in particular, fees to Joseph Ferranti, an elevator inspector employed by the New York City Department of Buildings, and payments to Mordechai Margolese, a co-worker of Aron Krieger and Mr. Eilets. Respondent was charged with violating DR7-109(c)(1).

Since the record indicated that payments were made to these witnesses without any consideration for their lost time and expense incurred, the Special Referee concluded that such were unreasonable and excessive. As such, count seventeen was sustained.

With respect to *Hill v. Soley, Supreme Court, Bronx County*, the Special Referee did not sustain any of counts Eighteen through Twenty-Three-relating to this litigation.

The Special Referee sustained fourteen of the twenty-three charges as set forth above.

Respondent is a graduate of Harvard Law School and became a partner in the Manhattan firm, which is today known as Phillips Nizer. He left Phillips Nizer in the 1960's to form his own firm where he has specialized in personal injury cases. He has submitted a plethora of references and letters attesting to his probity, character and skill.

On March 16, 1993, Special Referee Donald J. Sullivan issued his written report recommending that respondent should be suspended from the practice of law for a period of two years.

By petition dated April 23, 1993, the Departmental Disciplinary Committee now seeks an order confirming the findings of the Special Referee and imposing whatever sanction the court deems just and equitable, but no less

severe than the two year suspension recommended by the Special Referee.

Respondent cross-moves for an order disaffirming the Special Referee's report as it relates to the findings of misconduct against respondent and dismissing all charges. In the alternative, respondent requests that if any charges are sustained, no more than a censure should be imposed as the sanction.

A review of the evidence presented to the Special Referee indicates that there is ample support for the Special Referee's findings that respondent is guilty of multiple serious violations of the Code of Professional Responsibility.

During the course of his representation of the plaintiff in the *Mowen* case, respondent made false statements without personal knowledge or factual basis in an affidavit to Judge Leval (the charge respondent admitted in the federal disciplinary hearing); respondent knowingly made false statements of fact in his affidavit to Judge Leval; respondent gave false and misleading testimony under oath to Judge Leval at a hearing; and respondent failed to notify the court of the false statements in the affidavit once he was informed by Cuccia that the affidavit was false. Respondent's actions in the *Mowen* case were detrimental to his client in that such resulted in the jury's award for certain losses being reduced, or in the alternative, if plaintiff did not agree to the reduction, a new trial would be ordered.

In view of the fact that count 3 (which alleges that respondent acted with reckless disregard for the truth in making false statements in his affidavit) and count 4 (which alleges that respondent made false statements in his affidavit knowing that such statements were false) were charged and argued in the alternative, we find the referee's sustaining

both counts to be inconsistent. In view of the admissions by respondent in count 2, and the testimony of others present in the *Mowen* courtroom which clearly indicated that respondent was involved in the exhibit marshalling process, we conclude that respondent intentionally made false statements in his affidavit and as such, we dismiss Count 3 and sustain Count 4. The act of respondent is either intended or not intended, it cannot simultaneously be both. (*People v. Gallagher*, 69 NY2d 525, 529).

Respondent's claim that the evidence fails to establish that he intentionally gave false testimony to Judge Leval at the hearing on July 20, 1982 (count 5) is without merit. Respondent's testimony at the hearing that he was not present in the courtroom during the exhibit marshalling process was contradicted by the *Mowen* trial transcript which placed him in the courtroom throughout that period.

Respondent's claim that he had no duty to inform the court of the false statements in his affidavit (count 6) because he was only made aware of the fact that it was false on the eve of the hearing, is also lacking in merit. The record established that at some point after Cuccia returned from abroad on March 17, 1982 and prior to Judge Leval's hearing on July 20, 1982, respondent's partner, Eisenstein learned from Cuccia and Cuccia was outraged by the accusations made by respondent in the affidavit and communicated this information to respondent on July 9, 1982. On repeated occasions prior to the hearing, Eisenstein stated that he asked respondent to discuss this issue but to no avail. Moreover, prior to learning of the falsity of the affidavit from Cuccia, respondent could not have believed what he wrote about Cuccia's state of mind since respondent admitted that he had conversations with Cuccia prior to the exhibit marshalling in which Cuccia acknowledged that Exhibit 337B was not to go to the jury.

As such, respondent clearly had a duty to inform Judge Leval of the false statements and he failed to do so.

With respect to the *Krieger* case, respondent solicited and requested Cohen, a prospective witness to give false testimony at the trial, respondent solicited and requested Cohen, a prospective witness to make false statements to opposing counsel; respondent failed to disclose to the court that one of the witnesses for the plaintiff gave material false testimony; respondent failed to supervise his private investigator; respondent engaged in fee-splitting with a nonlawyer and respondent paid unreasonable and excessive compensation to witnesses. As a result of respondent's actions a mistrial was declared in the *Krieger* case.

Counts 7 and 8 and 9 and 10 were respectively charged and argued in the alternative, but all were sustained by the Referee. However, the fact that respondent solicited Cohen to give false testimony at trial does not preclude the fact that respondent also solicited Cohen to make false statements to opposing counsel. Accordingly, the Special Referee properly sustained all four counts.

The balance of respondent's claims with respect to the sufficiency of the evidence supporting the remaining *Krieger* counts are without merit. The tape-recorded conversations between respondent and Cohen voluntarily made by Cohen, as a part of a police investigation, were stipulated into evidence by respondent and did not touch upon any attorney-client or work-product privilege.

Finally, respondent's argument that the application of the fair preponderance of evidence standard of proof in attorney disciplinary proceedings violates his due process rights under the United States and New York State Constitution has been rejected by the New York Court of

Appeals. That Court has conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence. (*Matter of Capoccia*, 59 NY2d 549 [1983]). Of course, there is no requirement of a criminal conviction to sustain a charge in an attorney disciplinary proceeding. While respondent argues that the clear and convincing evidence standard should be adopted by this Court he has set forth no valid reason why this Court should entertain a change of the law in New York and apply a different standard.

The sanction of suspension from the practice of law for a period of two years recommended by the Special Referee is far too lenient given the serious violations of the Code of Professional Responsibility involved, which as the Special Referee noted, go to the heart of the ethical responsibility of a practicing lawyer. Respondent's violations include several acts of intentional dishonesty, including the filing of a knowingly false and misleading affidavit, the giving of false testimony at a hearing before then Southern District Judge Pierre N. Leval, and the solicitation of false testimony from a fact witness.

Any one of these many serious violations would be ground for removal of respondent from the roll of attorneys. The fact that there were many discrete acts of misconduct leads ineluctably to the conclusion that the only just punishment for respondent must be disbarment. (*See, e.g.*, *Matter of Kleiman*, 107 AD2d 241). As we noted over seventy years ago, false testimony, even if not technical perjury, and the making of false affidavits *should* result in disbarment (*In the Matter of Popper*, 193 AD 505). "The giving of false testimony strikes at the very heart of the judicial system. That an officer of the court should countenance it in another is intolerable. That he should himself be guilty of such an offense against good morals and

the public weal is not to be condoned. By such conduct he has forfeited the confidence of the court and his right to continued certificate of good character and integrity" (*Id.* at 512).

In a similar case, in which we disbarred an attorney, we noted: "The concededly false answers given and respondent's lack of candor, whether technically perjurious or not breached the standards of professional ethics [citation omitted]" (*In the Matter of Dougherty*, 7 AD2d 163, 165; see also, *In the Matter of Kunstler*, 248 AD 393). To the same effect, in *Matter of Schildhaus*, (23 AD2d 152), we held: "An attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings. So, a deliberate misrepresentation by an attorney of material facts in open court constitutes serious professional misconduct [See *Matter of Rotwein*, 20 AD2d 428, 430. See, further, Drinker, Legal Ethics, p. 74; 7 C.J.S., Attorney and Client, § 23, p. 741]" (*Id.* at 155-56).

In the instant case, respondent was found to have lied at a hearing held by a judge of the Federal Court and to have submitted a knowingly false affidavit which unfairly and reprehensibly cast his own guilt upon a blameless fellow member of the bar. In addition, respondent, *inter alia*, solicited and requested a witness to give false testimony at a trial and stood by when another witness gave material false testimony which respondent knew to be false without revealing the fraud to the court or the parties.

These acts constitute a pattern of conduct by respondent which demonstrate a contempt for the legal and

judicial process as well as for the profession. "One need not be a lawyer to recognize the impropriety of such conduct. For an attorney practicing for nearly 40 years in this State, such misconduct is inexcusable, notwithstanding an impressive array of character witnesses who testified in mitigation" (*In the Matter of Cohen*, 118 AD2d 15, 48).

In view of these serious acts of misconduct which had the effect of perverting the administration of justice, we reject the recommended suspension of respondent and find that disbarment of the respondent is the only proper punishment.

The violations of the canons of ethics by the respondent were not simply inadvertent or solitary peccadillos. They consisted of a pattern of professional misconduct persisted in as a course of conduct for at least a decade. For this Court to impose any other sanction would ignore our responsibility to the legal profession and the public.

Accordingly, the Disciplinary Committee's petition to confirm the Special Referee's report is granted to the extent that the findings of the Special Referee sustaining counts 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, and 17 are confirmed; the Special Referee's finding with respect to count 3, as well as the recommended sanction of suspension for a period of two years are disaffirmed. Respondent's cross-motion for an order disaffirming the Special Referee's report as it relates to the findings of misconduct against respondent is granted only to the extent of disaffirming the finding as to Count 3 and in all other respects respondent's cross-motion is denied. Respondent is disbarred and his name ordered stricken from the roll of attorneys in the State of New York.

All concur.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and or the First Judicial Department in the County of New York, on March 22, 1994

President - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch
Israel Rubin, Justices

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In the Matter of Theodore H. Friedman
(admitted as Theodore Herzl Friedman),
an attorney and counselor-at-law):

Departmental Disciplinary Committee
for the First Judicial Department,
Petitioner, M-2445
M-5413

Theodore H. Friedman, Esq.,
Respondent.

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The Departmental Disciplinary Committee for the First Judicial Department ("the Committee"), by Hal R. Lieberman, its attorney (Kenneth M. Bernstein and Jonathan K.M. Crawford, of counsel [Daniel L. Brockett, Special Trial Counsel), having presented a petition to this Court, on July 19, 1993, seeking an order pursuant to 22 NYCRR § 603.4(d) confirming the findings and conclusions of the

Special Referee and imposing whatever sanction upon respondent, Theodore H. Friedman (who, as Theodore Herzl Friedman, was admitted to practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court, First Judicial Department, on April 1, 1957), the Court deems just and equitable, but no less severe than the two-year suspension recommended by the Special Referee,

And respondent having appeared herein by Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, his attorneys (Marvin E. Frankel and Michael S. Ross, of counsel), and having cross-moved for an order disaffirming the Special Referee's Report,

Now, upon reading and filing the papers with respect to said petition and cross-motion, and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, and this Court having found and determined that in view of respondent's serious acts of misconduct which had the effect of perverting the administration of justice, the Court rejects the recommended suspension of respondent and it is unanimously

[M-2445/M-5413]

Ordered, that the application is granted to the extent that the findings of the Special Referee sustaining counts 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16 and 17 are confirmed; the Special Referee's finding with respect to count 3, as well as the recommended sanction of suspension for a period of two years are disaffirmed; respondent's cross-motion for an order disaffirming the Special Referee's report as it related to the findings of misconduct against respondent is granted only to the extent of disaffirming the finding as to Count 3

and in all other respects respondent's cross-motion is denied; and it is further unanimously

Ordered: that said respondent be and hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York; that respondent's name be struck from the roll of attorneys and counselors-at-law in the State of New York; that said respondent be and hereby is commanded to desist and refrain from the practice of the law in any form; either as principal or agent, clerk or employee of another; that said respondent be and hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; that said respondent be and hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto; and that said respondent be and hereby is directed, within 30 days of the date of this order, to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof, all effective April 22, 1994.

ENTERED:

/s/ CATHERINE O'HAGAN WOLFE Clerk

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT STATE OF NEW YORK

I, CATHERINE O'HAGAN WOLFE, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on 3-22-94 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on March 22nd, 1994.

/s/ CATHERINE O'HAGAN WOLFE
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 7, 1994.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch
Israel Rubin, Justices.

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In the Matter of Theodore H. Friedman
(admitted as Theodore Herzl Friedman)
a disbarred attorney:

Departmental Disciplinary Committee
for the First Judicial Department,

Petitioner M-1814

against

Theodore R. Friedman,

Respondent.

---x

The above-named respondent having moved for reargument of the order of this Court entered on March 22, 1994 which disbarred him as an attorney and counselor-at-law in the State of New York effective April 22, 1994.

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and that same hereby is granted solely to the extent of deleting the words "persisted as a course of conduct for at least a decade" appearing in the second full paragraph on page 29 of this Court's Opinion Per Curiam accompanying the aforesaid order, and substituting therefor the words "persisted in as a course of conduct for at least several years", and said motion is otherwise denied in all other respects.

ENTER:

/s/ Catherine O'Hagan Wolfe
Clerk

APPENDIX F

DEPARTMENT DISCIPLINARY
COMMITTEE OF THE
SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION:
FIRST DEPARTMENT

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In the Matter of
Theodore H. Friedman,

Respondent.

Docket No. HP17/90
Before the Hon.
Donald J. Sullivan,
Special Referee to
the Departmental
Disciplinary Committee

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The undersigned was appointed on the 4th day of June, 1990, by the Appellate Division, First Judicial Department, to serve as Special Referee on behalf of the Departmental Disciplinary Committee (Committee) with respect to charges of professional misconduct made against the respondent. The statement of charges is based on the conduct of the respondent in his representation in matters known as: 1) *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537; 2) *Estate of Miriam Krieger v. City of New York*, Supreme Court, New York County (Index No. 8228/80); and 3) *Hill v. Soley*, Supreme Court, Bronx County (Index No. 18762/80). The statement of charges contained 23 separate and distinct charges relating to allegations of misconduct growing out of the above-mentioned matters. Formal proceedings were commenced by notice of charges dated July 20, 1990 and the respondent submitted "Answer to Charges" dated September 17, 1990. Hearings were commenced before me on the 26th day of July, 1990 and Post Hearing Proposed Findings of Fact and

Memorandum were submitted by the Committee on May 18, 1992 and by the respondent on August 17, 1992.

JURISDICTION

The respondent Theodore H. Friedman admitted that he was an attorney and counselor at law in the State of New York, having been admitted on April 1, 1957 at a Term of the Appellate Division of the Supreme Court, First Judicial Department. He further admitted that at all times referred to in the subject charges, he maintained offices for the practice of law within the First Judicial Department.

MOWEN V. YANGMING MARINE TRANSPORT CORP.

Charges 1-6

Respondent represented the plaintiff Lorraine Mowen in a wrongful death action arising out of a collision on May 20, 1978 of the cargo ship "Ming Giant" and the tug boat "Ocean King." In the subject collision, Lorraine Mowen's husband, Dennis Mowen, lost his life. The respondent was assisted in this matter by his then partner, Jethro M. Eisenstein and by Frederick J. Cuccia of the firm of Cuccia and Oster. The trial took place before the Hon. Pierre N. Leval of the United States District Court for the Southern District of New York in late 1981 and early 1982. During the trial, the respondent called a Dr. Conrad Berenson as an expert to testify on the question of damages. A product of Dr. Berenson's testimony was marked for identification, namely PX-337(B). Judge Leval eventually ruled that PX-337(B) was not admitted in evidence, but that the respondent could use it argumentatively in his summation. After the jury commenced their deliberation a note was received requesting the trial exhibits. The trial court instructed the exhibits in evidence be collected and delivered to the jury

and repeated the admonition re Exhibit 337(B) which was used in summation but was not in evidence in chief. Thereafter, the jury returned a verdict in favor of the plaintiff and shortly after the announcement of the jury's verdict, Judge Leval's law clerk, Mark Drooks, inspected the contents of the jury room and found PX-337(B), a fact which the court immediately advised counsel. The court advised counsel to file post-trial motions addressing the significance of this discovery on the jury's verdict. The respondent thereafter submitted an affidavit, sworn to March 8, 1982, which placed sole responsibility for sending PX-337(B) to the jury room on his co-counsel, namely Mr. Cuccia. The respondent made no effort to communicate with Mr. Cuccia before submitting this affidavit, and no affidavit was submitted by Mr. Cuccia, who was abroad from March 7 to March 17, 1982. By order dated July 1, 1982, Judge Leval set July 16 for a hearing on defendant's post-verdict motion. The order stated: "Evidence will be taken on the question of the exhibits sent into the jury room." At a hearing which was not held until July 20, 1982, Judge Leval took testimony under oath from all counsel, Courtroom Deputy Patrick Bowes; and his law clerk Mark Drooks. Following the submission of post-hearing briefs, the post-verdict motion was sub judice until December 3, 1982, when Judge Leval rendered an opinion directing a remittitur of the jury verdict. In his opinion, Judge Leval found respondent to have engaged in the "willful misconduct of . . . tampering with the evidence transmitted to the deliberating jury." Judge Leval stated that respondent had "surreptitiously includ[ed] among the exhibits to be sent to the jury an exhibit marked for identification that he well knew had not been received in evidence." Judge Leval concluded that when the jurors were deliberating and asked for all evidence in the case, respondent caused the exhibit to be sent to them "intentionally and with full awareness that it was in violation of the court's order and rulings as to the receipt of the

exhibit." Judge Leval rendered an opinion that the respondent had lied during the hearing by claiming that he had left the courtroom for lunch and had entrusted his co-counsel, Mr. Cuccia, to handle the exhibits that were sent to the jury. Judge Leval thereafter issued a letter of complaint both to the Committee and to the Federal Disciplinary authorities. Pursuant to that complaint, four separate charges were filed against respondent in a Federal Disciplinary Proceeding. The first alleged that respondent had knowingly prepared and sworn a false affidavit blaming his co-counsel, Mr. Cuccia, for placing the controversial exhibit in the jury room. The second charge alleged that he had prepared and sworn a false affidavit blaming Mr. Cuccia without personal knowledge or factual basis. The third charge alleged that he had knowingly given false testimony that he was absent from the courtroom when the exhibits were marshalled and delivered to the jury. The fourth charge alleged that he had knowingly delivered the unreceived exhibit into the jury room. Thereafter, the respondent admitted the second charge in exchange for dismissal of all other charges at a disciplinary hearing on January 9, 1985. On November 4, 1985, the Committee on Grievances of the Southern District recommended a sanction that a formal letter of reprimand be issued to respondent and that this letter be made a matter of public record. A subsequent letter of censure was written and distributed by Judge Vincent L. Broderick, Chairman of the Committee on Grievances on June 23, 1986.

Count No. 1

The essential elements of Count No. 1 are that Mr. Friedman intentionally caused to be placed in the jury room during deliberations an exhibit (PX-337B) when he knew that same had not been received in evidence, and the placing of said exhibit was done with full awareness that it was in

violation of the Court's order and ruling as to the receipt of the exhibit in evidence. It is conceded by the Committee that there is no direct testimony establishing that the respondent was responsible for placing the unreceived exhibit in the jury room. The Committee seeks to establish the essential elements of the Count No. 1 based on circumstantial evidence, that is, the importance of the subject exhibit, opportunity to place said unauthorized exhibit in the jury room and a strong desire to retrieve same following the verdict. Viewing all the evidence under a "fair preponderance" standard, I find that the Committee has failed to establish that the respondent, Theodore Friedman, intentionally sent exhibit 337(B) to the jury room.

Count No. 2

The essential elements of this Count, that is, the making of false statements without personal knowledge or factual basis, are based on an affidavit that was submitted in response to a post-verdict motion pending before Judge Leval, U.S.D.C., Southern District (*Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 [PNL]). The gravamen of paragraph 38 (Notice of Charges) was that Mr. Friedman swore to facts "about which he had no personal knowledge or factual basis, direct or indirect . . ." The essential elements of Count No. 2, except for slight modification, is word for word identical to the second charge issued by the Federal Grievance Committee to which respondent admitted and for which he was sanctioned. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(6) and DR7-106(C)(1).

Count No. 3

Count No. 3 charges the respondent with an act of professional misconduct in the preparation and swearing

through an affidavit which contained false statements without undertaking an effort to verify them and accordingly, the respondent acted with reckless disregard for the truth in violations of DR1-102(A)(5) and DR1-102(A)(6). The charge alleges that the false statements were made recklessly. I find that it has been established by a preponderance of evidence that the subject false statements were made without any effort to verify them. The respondent expressly admitted the second federal charge stating that "he had no personal knowledge or factual basis, direct or indirect." Said admissions were made to the federal charges brought on before the Committee on Grievances of the Board of Judges of the Southern District of New York, and also before a Grand Jury, that his affidavit, as it referred to Mr. Cuccia, were false. An attorney's submission of an affidavit blaming his co-counsel for so serious an act and purporting to describe his co-counsel's subjective state of mind without making any effort to confirm the truth with co-counsel, is certainly reckless in the circumstances. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(B) and DR7-106(C)(1).

Count No. 4

Said count charges the respondent with the making of an affidavit which was submitted to Judge Pierre Leval in the United States District Court for the Southern District of New York containing statements which were false and that the respondent knew that said statements were false. The record indicates that respondent had conversations with Mr. Cuccia which clearly indicate that exhibit 337(B) was not in evidence. Therefore, it could not have been indicated that Mr. Cuccia did this in good faith as set forth in the affidavit. Far from the false statements about Cuccia, the respondent's affidavit contains numerous other false or misleading statements of material fact about the exhibit marshalling

process. The respondent's statement that Cuccia handled the marshalling of the exhibits for the plaintiff was contradicted by others present in the courtroom who indicated that the respondent was involved in the process of marshalling the exhibits. Also contradicted by testimony was the respondent's statements that all the exhibits going to the jury were made available to counsel and that defense counsel had access and opportunity to examine them before the Clerk moved them into the jury room. The respondent also indicated that the Clerk checked with all counsel as to whether the plaintiff's exhibits had been reviewed and that all counsel assented before the same were moved into the jury room, and said statement was contradicted by the Clerk of the Court who indicated that he relied completely on the respondent in reference to the checking of the exhibits. It should be further noted that the respondent's sworn statements in his affidavit about what transpired during the period when the exhibits were being collected, is not in conformance with his position that he was not present when these events were occurring. Accordingly, if he was not present he could not have filed the affidavit based on personal knowledge. Accordingly, I find that the statements set forth in the subject affidavit were statements made by the respondent knowing that said statements were false, and accordingly, the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A(6), DR7-102(A)(5), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 5

The essential elements of this Count charge Mr. Friedman of intentionally making a false and misleading statement while testifying at the July 20, 1982 hearing before Judge Leval concerning his presence in the Courtroom during the entire marshalling process. It is the position of Mr. Friedman that said testimony was somewhat inaccurate

but not intentional and thus, not sufficient to establish an ethical violation. Mr. Friedman's testimony was contradicted by the trial transcript, which placed the respondent in the Courtroom throughout the period which the exhibits were being marshalled. It is the position of the respondent that he considered the issues so relatively insignificant that he neglected to review the trial transcript; that said position must be reviewed in the context that the purpose of the hearing set down by Judge Leval was to take evidence on the subject of the unauthorized exhibit in the jury room. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(4), DR7-102(A)(6), DR7-102(A)(5), DR1-702(A)(6) and DR1-702(A)(8).

Count No. 6

This count charges the respondent with professional misconduct for failing to advise the Court of inaccuracies in his affidavit, once having been informed through Mr. Cuccia that portions of the affidavit was inaccurate. The record clearly indicates that Mr. Cuccia returned from Europe on or about March 17, 1982 and when made aware of the contents of the affidavit submitted by the respondent to Judge Leval challenged the contents of the affidavit. Further, the record indicates that at no point prior to, during or subsequent to Judge Leval's hearing, did the respondent take any steps to inform Judge Leval of Mr. Cuccia's position re the contents of the affidavit. it is clear that the respondent admitted the conversations with Cuccia prior to exhibit marshalling, in which it was acknowledged by Cuccia that Exhibit 337(B) was not to go to the jury room and accordingly, that said statement flies in the face of the allegation set forth by the respondent in the affidavit wherein it is alleged that Mr. Cuccia acted in "good faith." It is the position of the respondent that DR1-102(A)(4), that is, prohibiting a lawyer from engaging in conduct involving dishonesty, fraud,

deceit, or misrepresentation within the context of the subject facts, is not violative of this Section in that it does not rise to the level of morally abhorrent behavior. I find that the respondent knew or should have known of the inaccuracies of the allegations as he set forth in the affidavit which was to be presented to Judge Leval and in failing to rectify the record, he violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-102(A)(6).

ESTATE OF MIRIAM KRIEGER v. CITY OF NEW YORK

Charges 7-17

The respondent represented Miriam Krieger and the Estate of Aaron Krieger in a civil negligence lawsuit filed in Supreme Court, New York County. The plaintiff sought monetary damages for the death of Aaron Krieger, who fell down an elevator shaft at 291 Bowery Avenue on April 4, 1979. Named as defendants in the case were the City of New York (City) which owned the building and Universal Elevator Company (Universal) which had been retained by the City to maintain the repair of the elevator. Stanton Trading Corporation (Stanton), a tenant of the building, and Aaron Krieger's employer at the time of his fatal fall, was impleaded as a third-party defendant. A central issue in the plaintiff's claim against the City was whether the safety devices on the elevator were working properly at the time of Aaron Krieger's death. To establish its defense, the City, represented by Laura Shapiro of the Corporation Counsel's Office, intended to call Michael Cohen, a Stanton employee at the time of the accident, to testify about the manner in which Stanton employees operated the elevator. During the course of the trial, Cohen met with Shapiro.

The respondent retained Mr. Elliott Goldman, a private investigator, to investigate the accident and prepare

witnesses for trial. The respondent performed no background investigation of Mr. Goldman prior to retaining him. Mr. Goldman was given authority to compensate witnesses without prior approval from respondent or anyone in respondent's office, nor did he give Mr. Goldman guidelines to follow with respect to the interviewing of witnesses and the taking of statements. Under the terms of the agreement with the respondent, Mr. Goldman was promised 50% of Goldman's hourly rate on billing and an additional 100% of this rate on accumulated hours if the case was successful. The charges allege that as the result of the actions of Elliott Goldman and the failure of the respondent to properly supervise, Mr. Goldman interviewed and obtained statements which were in fact fabrications of the facts. The charges further indicate that the respondent met with Michael Cohen, one of the witnesses who had been contacted by Mr. Elliott Goldman, prepping him as to how to handle the examination and/or cross-examination of the City's counsel. The respondent's law firm reimbursed Mr. Goldman for each of the payments he made to the witnesses. One of the witnesses, namely Arthur Eilets, who had been contacted by Mr. Goldman, during Ms. Shapiro's recross examination of Mr. Eilets, gave false answers in response to several questions touching on his bias and credibility as a witness. The respondent never revealed Mr. Eilets' false statements to the court or parties although the respondent knew same to be false. In February of 1986, Mr. Goldman was indicted for bribery of a witness based on his November 21, 1985 meeting with Michael Cohen. The respondent was furnished with a copy of a tape in reference to the meeting by Goldman and Mr. Cohen. Despite listening to the tape, the respondent continued to use Mr. Goldman's services on the *Krieger* case and other cases at least up until sometime in 1987.

Count No. 7

The thrust of this Count is that on December 16, 1985, the respondent solicited and requested Michael Cohen, a prospective witness for the City in the *Krieger* case, to give false testimony at trial that his only meeting with respondent consisted entirely of the discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel. After a reading of the tape and the surrounding circumstances, it is clear to this Referee that the respondent was preparing Mr. Michael Cohen to give false testimony at the *Krieger* civil trial. The meeting met the test of coaching and instructing Mr. Cohen as to what to say on the witness stand, and further, offering Mr. Cohen a theory to reconcile any conflicting statements that he may have given. It is the respondent's position that he sought to have Mr. Cohen give disinformation to his adversary, not commit perjury while testifying. I find that the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 8

The respondent is charged with soliciting or requesting Michael Cohen, a prospective witness for the City of New York in the *Krieger* case, to give false testimony at trial that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a witness. The record clearly indicates that in fact the respondent knew that an investigator, namely Elliot Goldman, had paid and had offered to pay Michael Cohen money in connection with his prospective appearance as a witness. The defense to this charge is again that the respondent sought to have Cohen give disinformation to his adversary. The respondent violated DR1-102(A)(4), DR1-

102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 9

The respondent is charged with requesting Michael Cohen, a prospective witness for the City of New York in the *Krieger* case, to make false statements to opposing counsel, Laura Shapiro of the Corporation Counsel's office, that Cohen's only meeting with respondent consisted entirely of a discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel. The position of the respondent is that same was a disinformation ploy which was not malicious nor was there any premeditation, but same was to increase the likelihood that Mr. Cohen would be called by the City through Laura Shapiro, the Corporation Counsel. It is clear that a direct misrepresentation of material fact to opposing counsel made at the direction of Mr. Friedman with the intent to induce reliance thereon is unethical professional conduct. Said conduct constituted a violation of DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-109(A).

Count No. 10

Said count indicates that Mr. Friedman solicited and requested Michael Cohen to make false statements to opposing counsel, Laura Shapiro of the corporation counsel's office, that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a witness. This Count is similar to No. 9 in that the thrust is soliciting a prospective witness to lie to the respondent's opposing counsel, Laura Shapiro of the corporation counsel's office. The respondent's position that same was not malicious nor that was there any pre-

meditation, and further the intent was to increase the likelihood that Mr. Cohen would be called as a substantive truthful witness by the opposition. As indicated in Count No. 9, sound considerations of policy clearly establish that a direct misrepresentation of material fact to opposing counsel made at the direction of a lawyer in the course of litigation and with the intent to induce reliance thereon is unethical professional conduct. The respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-109(A).

Count No. 11

The respondent is charged with soliciting and requesting Michael Cohen, a prospective witness for the City in the *Krieger* case, to give false testimony that he had been and recalled being present when Wilhemina Oliver, a Manager for the City of New York, was told of dangerous conditions concerning the elevator which was the site of the accident and that she promised to have those conditions corrected. Although the evidence submitted in reference to this charge is at times contradictory, the credible evidence establishes that the respondent asked Mr. Cohen to testify falsely about Wilhemina Oliver, or, at the least, that respondent ask Mr. Cohen to say things which Cohen did not know or believe to be true. I find that the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 12

The respondent is charged with soliciting and requesting Arthur Eilets, a witness for the plaintiff, to give false testimony. There is no direct evidence that the respondent solicited and requested Arthur Eilets, a witness for the plaintiff in the *Krieger* case, to give false testimony

as set forth in the subject Count. There is substantial circumstantial evidence, that is, conversations between Cohen and Eilets, and Goldman and Eilets -- the foundation the special counsel seeks to build his inferences that the respondent solicited and requested the false statements as set forth in the subject charge. I find that a committee has failed to establish by a preponderance of evidence the essential elements of Count No. 12 re that the respondent solicited and requested the subject false testimony.

Count No. 13

The respondent is charged with professional misconduct in that having been present when a witness for the plaintiff, Arthur Eilets, gave material false testimony, which the respondent knew same to be false and he took no steps to reveal the fraud to the Court or the parties. Both the Committee and the respondent produced experts in the field of ethics, Professor Wolfram, who testified on behalf of the Committee, and Professor Hazard on behalf of the respondent. The respondent further produced two distinguished members of the Bar, that is, Robert Conasan, Esq. and Thomas Moore, Esq. The ethical rule most directly applicable to the charge is DR7-102(B)(2). The testimony of Messrs. Conasan and Moore was offered so that the conduct of Mr. Friedman could be evaluated in terms of what the legal community reasonably believed was reasonable and ethical that is a view from the well. It is the position of the respondent that his duty was excused in this case because Eilets' false testimony went to collateral matters and because it was elicited on cross-examination, as opposed to direct examination, and therefore argues that the false testimony was not a fraud upon the Tribunal within the meaning of the rule. As indicated, the Committee agrees that it is appropriate to read some concept of materiality into DR7-102(B)(2), but it is the position of the Committee that

the Eilets' testimony was pivotal to the respondent's case. The respondent subjectively evaluated the testimony as "collateral" and made a "judgment call" and failed to reveal the Eilets' false testimony. The respondent's position is he exercised his judgement in favor of his client. The respondent opines that credibility of a witness is not always collateral but it was collateral in reference to Eilets' testimony. The respondent arrived at said conclusion in spite of the fact that Eilets was on the stand for four days, that he was prepared for said testimony by the respondent, and that he was paid $1,900.00 plus a suit and transportation. I find that the Committee established that Mr. Eilets gave material false testimony which the respondent knew to be false and took no steps to reveal said facts to the Court or parties and accordingly violated DR7-102(B)(2).

Count No. 14

The respondent is charged with committing acts of professional misconduct in failing to supervise and give appropriate instructions to an investigator, namely Elliott Goldman, who had been hired by the respondent in reference to, among other cases, the *Krieger* case. Count No. 14 further charges the respondent with failing to take reasonable remedial action after it became apparent that Mr. Goldman was engaged in unethical and illegal behavior. The record indicates that Mr. Friedman was exposed to Mr. Goldman in approximately 1979 when he was a partner in the firm of Schneider, Kleinick, Friedman, Arum & Katz. Mr. Elliott Goldman was one of the number of private investigators used by the "Schneider" firm who had substantial experience as a trial prep man. The record further indicates that the respondent continued to use Mr. Goldman's services in other cases after the respondent left the "Schneider" firm and formed the firm of Friedman, Ennis & Isenstein. The record

clearly indicates that the respondent did not conduct any background investigation, nor did he set down any parameters or give any direction to Mr. Goldman in the performance of his duties as a private investigator. These actions or failure to act by the respondent was premised on the basis that Mr. Goldman was an experienced prep man who did not need instruction on interviewing witnesses or taking statements. But there came a time when the respondent should have been alerted that Mr. Goldman was engaged in questionable activities, in particular, the backdating of a statement that had been obtained by Mr. Goldman from a Mr. Henry Richardson and after being made aware of the contents of a tape of 11/21/85 re a meeting with Mr. Goldman and a Mr. Cohen. Said facts triggered an affirmative duty on the part of the respondent to investigate and review Mr. Goldman's tactics in obtaining witnesses' statements. When language which was utilized by Mr. Goldman such as "sign anything," and language such as "pay me for my testimony," a statement made by Mr. Cohen to the respondent allegedly made by Mr. Goldman, and the fact that after February 1986 Mr. Goldman was indicted for bribery of a witness based on the 11/21/85 meeting with Mr. Michael Cohen, all of said statements and/or actions triggered an affirmative duty on the part of the respondent to take reasonable remedial action to reign in and control Mr. Goldman as a private investigator. Accordingly, I find that the respondent violated DR1-102(A)(5).

Count No. 15

The subject Count charges the respondent with committing acts of professional misconduct in that he acquiesced in the payment of compensation to a witness in the *Krieger* case, namely one Arthur Eilets, contingent on the contents of Eilets' testimony. The record indicates that Mr. Eilets, who was retired at the time of the trial, received

approximately $1,900.00 and additional compensation for expenses during the trial such as a new suit and transportation to and from the Courthouse. It is clear that the amount of payment to a witness should not be so high as to induce the witness to testify falsely and further, that such questions ultimately become matters of judgment. The record does indicated that Mr. Eilets testified four days during the course of the *Krieger* trial. I find that on its face, the amount of compensation paid to Mr. Eilets appears to be generous, but I fail to find that the record substantiates the position of the charge that the payments were contingent on the contents of Eilets' testimony. Accordingly, I find Count No. 15 not proven.

Count No. 16

The respondent is charged with entering into a contingency fee arrangement with Elliott Goldman, a non-lawyer, under which respondent agreed to pay Goldman 50% of Goldman's hourly rate on billing and an additional 100% of this rate if the case was successful. The respondent admitted in Grand Jury testimony that he had an agreement with Elliott Goldman where Mr. Goldman would receive additional monies over and above his hourly compensation, and that same was contingent on the success of the litigation. It is the position of the respondent that Mr. Goldman was not receiving a percentage of Mr. Friedman's fee, or a percentage of the firm's profit, and further that DR3-102 was enacted to prohibit the payment to a non-lawyer based on a percentage of the recovery in a case. The respondent's position that it is not fee splitting since it is not paid out of the net fee of Mr. Friedman, the respondent. I find that it is clear that the respondent-Goldman's fee arrangement was contingent on the outcome of the *Krieger* case. The agreement making Mr. Goldman's remuneration contingent on winning the *Krieger* case, created an incentive for Mr.

Goldman to make that outcome eventually beneficial to him and created the incentive to influence the testimony of a witness. I find that the interpretation of the respondent would frustrate the primary purposes of DR3-102. I find that the respondent violated § DR3-102 which prohibits fee splitting with a non-lawyer.

Count No. 17

The respondent is charged with acts of professional misconduct in that he offered and paid, and acquiesced in the payment of, unreasonable and excessive sums of money and other benefits to witnesses and prospective witnesses, in particular, fees to Joseph Ferranti, an elevator inspector employed by the New York City Department of Buildings, and payments to Mordechai Margolese, a co-worker of Aron Krieger and Mr. Eilets. Within the contents of the record, I find that the Committee has established that the payments to the aforementioned individuals were unreasonable and excessive within the purview of DR7-109(C)(1). Accordingly, I find the respondent violated DR7-109(C)(1).

HILL v. SOLEY, Supreme Court, Bronx County

Charges 18 - 23

The litigation grew out of vehicular accident occurring in the Bronx, New York on July 11, 1982. The accident involved a motorcycle driven by the plaintiff, Brian Hill (Hill), and an automobile driven by the defendant, Oswald Soley (Soley), resulting in injuries in Hill's left leg and foot. The plaintiff, Hill, alleged that his injuries which grew out of the vehicular accident, were compounded by the post-accident treatment he received at Montefiore Hospital (Montefiore), the defendant, in a second cause of action

instituted by Hill. On February 8, 1988, during a recess in jury selection, a discussion took place between the respondent and a Robert Philips, Esq., attorney for Soley. It was the position of Mr. Philips that he understood that the discussion involved perjury by Soley about the cause of the underlying accident or at the very least, it was intended by respondent, and understood by Philips, that Soley would not appear at the trial to contradict the testimony of Hill, and that Soley would adopt a trial strategy designed to enhance Hill's likelihood of recovery against Montefiore. On February 9, 1988 in a recorded colloquy involving Mr. Philips, Justice Florio and Mr. Adelman (counsel for Montefiore), Mr. Philips revealed respondent's proposal to the court. When first confronted with the matter, respondent flatly denied that any such discussion had taken place between Philips and himself on the subject of respondent's proposal. But after the court reporter arrived, the respondent acknowledged some conversation had taken place. It was the position of the respondent that the conversation between himself and Mr. Philips related purely to trial strategy and that he never proposed any deal to Mr. Philips, let alone one involving a change in testimony by Soley. Thereafter, Justice Florio disbanded the jury and recused herself from the case. During the course of the retrial of the case which took place in the late 1989, respondent offered the testimony of an orthopedist named Dr. John Nailor. Dr. Nailor testified on direct examination, that he was a diplomat in the American Board of Orthopedic Surgeons. Thereafter, evidence was introduced to indicate that Dr. Nailor was not certified by the American Board of Orthopedic Surgeons. Respondent's explanation consisted of a letter dated January 4, 1990 from a Dr. Rask of the American Academy of Neurological and Orthopedic Surgeons verifying that Nailor was board certified by that organization, an organization which is not recognized by either the American

Medical Association or the American Academy of Medical Specialties.

Count No. 18

The respondent is charged with committing an act of professional misconduct in that he proposed to Robert Philips, attorney for the defendant Soley, that respondent would guarantee that his client would not executed on a judgment in excess of $10,000 against the Soleys in exchange for an agreement by Soley to modify his testimony at trial to conform to Hill's version of the underlying accident. It is the position of the respondent that he in essence had what he referred to as a trial strategy conference wherein, if Mr. Philips would agree not to affirmatively call his client as a witness, and otherwise not play an aggressive role at trial, Mr. Friedman would not pursue the Soley family beyond the $10,000 insurance policy limit. It was the subjective evaluation of Mr. Philips that "Mr. Friedman's proposal would require that the substance of the sworn testimony of Soley would be materially changed . . . ." The record compiled before Justice Florio indicates that although the respondent did not use words to the effect of changing the testimony, it was Mr. Philips' subjective conclusion that Mr. Friedman was suggesting that Mr. Soley's rights should not be vigorously put forth in the subject trial. In reviewing the transcripts of the records compiled before Judge Florio and the testimony of Robert Philips who testified before this body, I find that the Committee has failed to meet their burden of proof to establish that the respondent proposed an arrangement whereby Soley would modify his testimony to conform to Hill's version of the underlying accident. Accordingly, I find Count No. 18 not proven.

Count No. 19

The subject Count alleges that on February 8, 1988 the respondent, acting as attorney for the plaintiff in the *Hill* case, committed an act of professional misconduct in that he proposed to Robert Philips, the attorney for the defendant Soley, a proposal in secret with the intent of remaining undisclosed to the other parties, namely the Court and the jury, that the respondent would guarantee that his client would not execute on the judgment in excess of $10,000 against the defendants Soleys in exchange for an agreement on the part of the Soleys not to appear at the trial or otherwise mount a liability defense relating to the underlying accident. In essence, the subject Count alleges that Mr. Friedman improperly sought to mislead the jury, enhance the credibility of plaintiff, Mr. Hill, and conceal his arrangement from the Court and jury. This charge is in the alternative to Count No. 18 wherein it was charged that the respondent solicited false testimony from Soley. The underlying charge is basically premised on what has become known as a "Mary Carter Agreement" (*Booth v. Mary Carter Paint Co*, 202 S.2d 8 (Fla. App., 1967) which is basically an agreement between an injured plaintiff and one co-tortfeasor placing a limit on the liability of the latter and providing that such sums will be reduced or extinguished in relation to the recovery against the non-agreeing co-tortfeasor. There is no uniform consensus with respect to "Mary Carter Agreements" concerning their ethical and legal viability. The New York Courts do not appear to have addressed the issue. The agreement which is the subject of this charge does not possess all of the essential elements as envisioned in a "Mary Carter Agreement." It is the position of the Committee that the essential elements of a "Mary Carter Agreement" are not present in the subject factual scenario and accordingly, the respondent's ethical argument as to the "Mary Carter Agreement" is not relevant. It therefore boils

down to a very simple question of whether the respondent's proposal represented a straightforward question of whether collusive and deceptive conduct, as in this particular charge, is prescribed by the disciplinary rules. I find that although all of the essential elements of the "Mary Carter Agreement" are not present, the concept was being relied on by the respondent to establish his trial tactics, and based on the acceptability of such an agreement within the Bar, I find that Count No. 19 has not been proven.

Count No. 20

The subject Count charges the respondent, when acting as an attorney for the plaintiff in the *Hill* case, with committing an act of professional misconduct in that having been questioned about the existence and the contents of a conversation between himself and Robert Philips on February 8, 1988, the respondent denied to the Court that any such conversation had taken place on that day in spite of the fact that he knew said statement was false. The basis of this charge is that the respondent told a different story about his conversation with Mr. Philips in an unrecorded colloquy than what he set forth on the record before the Judge and the parties. I find that the Committee has failed to establish the essential elements of the subject charge and accordingly, the Count is not proven.

Count No. 21

This Count, namely Count No. 21, is related to the aforementioned Count No. 20 which is premised on the respondent having knowingly made false and misleading statements to the Count after the court reporter was called in during the "on the record" conference before Judge Florio. I find that the Committee has not established by a preponderance of evidence that the subject trial strategy

discussions between the respondent and Mr. Philips rose to the level that same constituted a violation of the code of professional responsibility, in particular, the sections as highlighted in Count No. 21. Accordingly, I find that said Count is not proven.

Count No. 22

Said Count charges the respondent with committing an act of professional misconduct in the he directed his employees and agents to destroy a portion of the respondent's files relating to the *Hill* case even though at the time, the respondent knew that said case was the subject of disciplinary investigation; that the respondent's counsel had previously accepted a subpoena calling for the entire contents of the subject file, and that the respondent knew that Counsel had accepted service of said subpoena. The respondent does not contest that he ordered the documents destroyed, nor does he contest that he knew that the *Hill* case was under investigation and that he had been served with a subpoena, but in essence alleges that certain office practices were established as to what particular records and/or documents would be disposed of when a case was closed. The respondent further indicates that all relevant documents relating to the contested issues were in fact, produced to the Committee. The respondent was responsible for compliance with the subject subpoena and cannot abrogate responsibility because he delegated the responsibility to his counsel, but within the totality of the factual pattern of the subject case, I find that the essential elements of Count No. 22 have not been established and accordingly, not proven.

Count No. 23

On November 21, 1989, the respondent, counsel in the *Hill* matter, committed an act of professional misconduct

in that he solicited from one Dr. John R. Nailor, an orthopedic expert called to testify by respondent, that he was a diplomat in the American Board of Orthopedic Surgeons, when in fact the respondent knew or should have known that this testimony was false. The record indicates that the subject witness was prepared by an associate of Mr. Friedman, namely Mark Bern, Esq., and he was satisfied that Dr. Nailor possessed the essential certification, that is Board Certification, as a diplomat in the American Board of Orthopedic Surgeons. When Dr. Nailor was asked whether he was "Board Certified," Bern understood the meaning to be certified with the American Board of Orthopedic Surgeons, when in fact Dr. Nailor was certified by the "American Board of Neurological Orthopedic Surgeons." The pivotal section which is paramount in this particular charge is DR7-102(A)(6) which provides that "in the representation of a client, a lawyer shall not . . . participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." I find that the Committee has failed to establish the essential elements of said section and accordingly, find said charge not proven.

RECOMMENDATIONS

The within matter is respectfully referred to the Court pursuant to Rule 605.15(e) with my recommendation of suspension.

PRIOR ACTIONS

Respondent has received a prior letter of censure from the Committee on Grievance of the Southern District dated June 23, 1986. The letter of censure grows out of a complaint issued by the Hon. Pierre N. Leval of the United States District Court for the Southern District of New York. The charge, that is, preparing and swearing a false affidavit

without personal knowledge or factual basis, is a product of the *Mowen v. Yangming Marine Transport Corp.* matter which was also the subject of Count No. 3 of the subject proceedings.

RECOMMENDED SANCTION

The respondent, Theodore H. Friedman, is a native New Yorker who was born and raised in the Bronx. He did undergraduate work in Michigan and thereafter, won a scholarship to Harvard Law School. He graduated from Harvard with distinction and later became a partner in a prestigious Manhattan firm, which is today known as Phillips Nizer. He left Phillips Nizer in the 1960s to form his own firm where he specialized in personal injury cases. From all accounts, the respondent, Theodore H. Friedman, is a lawyer of exceptional abilities and energies who has risen to the top of his profession. He as argued cases before the United States Supreme Court and is considered by his peers to be one of the finest, if not the finest, personal injury trial lawyer in New York. He is one of this City's leading negligence lawyers with over thirty years experience in the maritime and personal injury field. He is married and the father of two children. (Opening statement by Daniel L. Brockett, Esq., Special Trial Counsel, Department Disciplinary Committee, pps. 16 and 17, July 1, 1991).

The respondent has practiced law for approximately 35 years, having been admitted on April 1, 1957. Other than the three causes of action which have resulted in the subject charges, the respondent, who is an active litigator, conducted his professional life within the parameters of the Code of Professional Responsibility (Code), but in recent years it appears that he has become consumed with the will to win at any price. His success in his specialty seems to have dulled his responsibility to seek justice within the

guidelines of the Code. The charges that I have found proven violate the Code and go to the heart of ethical responsibility of a practicing lawyer. In the totality of the respondent's professional life the charges may seem few in number but the seriousness of the proven charges cry out for condemnation. I therefore recommend that the respondent be suspended for a period of two years and before an application for reinstatement be entertained, he participate in a recognized ethics course which should highlight his responsibility to the law and his client.

Dated: White Plains, New York
March 16, 1993

/s/DONALD J. SULLIVAN
DONALD J. SULLIVAN
Special Referee

APPENDIX G

RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN AND SOUTHERN DISTRICTS OF NEW YORK

* * *

Rule 4. Discipline of Attorneys

(a) The chief judge shall appoint a committee of the board of judges known as the committee on grievances, which under the direction of the chief judge shall have charge of all matters relating to discipline of attorneys. The committee on grievances may entertain complaints in writing from any source. Complaints, and any files based on them, shall be treated as confidential. The chief judge shall appoint a committee of attorneys who are members of the bar of this court to advise or assist the committee on grievances. Members of this committee will investigate complaints, and will serve as members of hearing panels.

(b) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been convicted of a felony in any federal court, or in the court of any state, territory, district, commonwealth or possession, the member's name shall be struck from the roll of members of the bar of this court.

(c) If it appears, after notice and opportunity to be heard, that any member of this court has been convicted of a misdemeanor, in any federal court or in the court of any state, territory, district, commonwealth or possession, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(d) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been disciplined by any federal court or by the court of any state, territory, district, commonwealth or possession, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(e) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has resigned from the bar of any federal court or the court of any state, territory, district, commonwealth or possession while an investigation into allegations of misconduct by the attorney were pending, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(f) If, in connection with activities in this court, any attorney is found guilty by clear and convincing evidence, after notice and opportunity to be heard, of conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force, the attorney may be disciplined by this court, in accordance with the provisions of paragraph (g).

(g) Discipline imposed pursuant to paragraph (c), (d), (e) or (f) may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court, it may also consist of striking the name of the attorney from the roll. In the case of an attorney admitted pro hac vice, it may also consist of precluding the attorney from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any.

Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar

concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion of the other court; or (2) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or that the imposition of discipline of this court would result in grave injustice.

(h) If it appears, after notice and opportunity to be heard, that any lawyer not a member of the bar of this court has appeared at the bar of this court without permission to do so, said lawyer may be precluded from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any.

(i) Complaints in writing alleging that any member of the bar of this court is in a category described in paragraphs (b) through (e), or that any attorney practicing in this court has committed the misconduct referred to in paragraph (f), will be directed to the chief judge, who shall refer such complaints to the committee on grievances, which may designate an attorney selected from the panel of attorneys to investigate the allegations if it deems investigation necessary or warranted. If, with or without investigation, the committee on grievances deems that the charges require prosecution, a statement of charges shall be served on the attorney concerned together with an order to show cause why discipline should not be imposed. Upon the respondent attorney's answer to the charges the matter will be scheduled for prompt hearing before a panel of attorneys which will report findings and recommendations. After such a hearing

and report, or if no timely answer is made by the respondent attorney or if the answer raises no issue requiring a hearing, such action shall be taken as justice and this rule may require.

(j) Any attorney who has been suspended or whose name has been struck from the roll of the members of the bar of this court may apply in writing to the chief judge, for good cause shown, for the lifting of suspension or for reinstatement to the rolls. The committee on grievances shall act upon the application, either immediately or after receiving findings and recommendations from a hearing panel of attorneys to which the application has been referred.

(k) Misconduct of any attorney in the presence of this court or in any manner in respect to any matter pending in this court may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both.

(l) Whenever it appears than an attorney admitted to practice in the court of any state, territory, district, commonwealth or possession, or in any other federal court, has in this court been convicted of any crime or disbarred, suspended or censured the clerk shall send to such other court or courts a certified copy of the judgment of conviction or order of disbarment, suspension or censure, and a statement of the attorney's last known office and resident address.

APPENDIX H

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE VINCENT L. BRODERICK
FOLEY SQUARE
NEW YORK, N.Y. 10007

June 23, 1986

Theodore Friedman, Esq.
Friedman & Eisenstein
325 Broadway
New York, New York 10007

Dear Mr. Friedman:

By letter dated March 15, 1983 you were informed that the Committee on Grievances of the Board of Judges of the Southern District of New York had received a complaint concerning you in the form of letters from Judge Leval with respect to activities by you in *Mowen v. Yangming Marine Transport Corp., et al.*, 78 Civ. 5537 (PNL), in which you were counsel for plaintiff. John D. Gordan, III, Esq. was designated by the Committee on Grievances to investigate, and he prepared a formal complaint dated January 20, 1984.

The charges were referred for report and recommendation to a panel of attorneys consisting of Peter Fleming, Jr., Pamela R. Chepiga, and Charles J. Hamilton, Jr. By letter dated December 12, 1984 the panel was advised that counsel for the committee and your counsel had agreed that all charges be resolved by your admission to the second charge.

The disposition set forth in this letter does not constitute any finding with respect to any charge preferred

against you, except the second charge. The other charges were not considered by the panel of attorneys, and hence have not been considered by the Grievance Committee. We recognize, of course, that given the admission to the second charge in lieu of a full hearing on all the charges, those other charges may not be the basis of other proceedings against you.

The second charge reads:

> On or about March 8, 1982, Theodore H. Friedman, Esq., the respondent, being then and there a member of the Bar of this Court and one of the attorneys for the plaintiff in the case of *Mowen v. Yangming Marine Transport Corp., et al*, 78 Civ. 5537 (PNL), then pending in this Court, did commit an act of professional misconduct, in that he prepared and swore, and caused to be served and filed in that action, an affidavit which contained the following averments:
>
> > 40. All of the exhibits going to the jury were marshalled and made available to counsel for their review before the Clerk brought them into the jury room. Mr. Cuccia handled this marshalling for the plaintiff. The defendants' counsel in the courtroom had access and opportunity to examine the exhibits before the Clerk brought them in. The Clerk checked with all counsel as to whether the group of exhibits had been checked out and were approved for bringing into the jury room. All counsel assented

> before the Clerk moved any of the exhibits into the jury room.
>
> 41. Mr. Cuccia acted in good faith. He removed, from the group of exhibits going into the jury room, both the exhibits prepared by counsel as a summation tool which summarized side by side the economic figures of Dr. Ralls and Dr. Berenson, and initial Exhibit 347A showing a computed loss figure before Dr. Berenson finished the corrected add-back computation.
>
> 42. Mr. Cuccia believed that since he had taken out the original uncorrected exhibits, the exhibit containing the corrected, record figures was to be included in the trial exhibits. * * *
>
> As Mr. Friedman then and there well knew, he had no personal knowledge or factual basis, direct or indirect, for making the foregoing averments.

On January 9, 1985 you appeared with counsel in a hearing before the panel and entered an admission to the Second Charge. Reputation evidence thereafter was taken from various witnesses. The panel also received letters bearing on your reputation. A report and recommendation was prepared by the panel on November 4, 1985 which is approved and adopted.

In determining the disposition to be made with respect to the charges the Committee on Grievances has considered the following recommendations contained in the report and recommendation of the panel.

RECOMMENDATION

> Candor is rudimentary in dealings with the Court. While respondent did not deliberately misrepresent, he asserted as fact what was only speculation. The absence of bad faith does not lessen the actual impact of false declaration. The truth is obscured and the Court is misled regardless of motive. It is not too much to require that speculative declaration, if ever necessary in the circumstances, must be identified for what they are.
>
> Respondent's professed good faith is not sufficient excuse for his breach of this basic obligation. The exhibit was discovered in the jury room shortly after the verdict on February 6, 1983. Counsel were advised immediately. A new trial motion was filed on February 12. Respondent's co-counsel, Mr. Cuccia, did not leave for vacation until March 7. There clearly was far more than adequate time for respondent to discuss this matter with Mr. Cuccia before preparing and executing his affidavit on March 8.
>
> Some form of sanction is required. A recommendation of the appropriate sanction is more difficult.

The following considerations are relevant in our view.

Respondent is an experienced trial lawyer of more than ordinary skills. He carries a heavy caseload and is dedicated to his clients' cause. It is reasonable to infer from the reputation evidence presented at the hearing that he carried out his professional responsibility with diligence. These characteristics are to be credited. It must also be said that his speculation as to his co-counsel's conduct, while baseless, did not advance his own cause. In stating that Mr. Cuccia was responsible for sending the exhibit to the jury, respondent actually conceded more than the evidence warranted. Nonetheless, it cannot be ignored that respondent's baseless speculation unfairly cast doubt on the professional conduct of his co-counsel.

We have concluded that the matter does not support the extraordinary sanction of disbarment or suspension from practice in this Court. Censure would not be inappropriate, but, viewing all the circumstances, and giving special weight to the reputation evidence we have received, we recommend that a formal letter of reprimand issue to respondent. We recommend further that these proceedings and the letter of reprimand be made a matter of public record.

The Committee on Grievances finds that in an affidavit filed with the court you asserted as a fact what was

only speculation and what, it developed, was not the fact. There was clearly more than adequate time to ascertain what the facts were before the affidavit was filed.

The Committee on Grievances has determined that you should be censured. This letter constitutes that censure.

This letter of censure will become a part of your file as a member of the bar of this court, and will close the matter. Copies of this letter will be sent to the Grievance Committee of the Appellate Division, First and Second Departments.

Sincerely,

/ s /
Vincent L. Broderick
Chairman
Committee on Grievances,
S.D.N.Y.

cc: John D. Gordan, III, Esq.
Peter E. Fleming, Jr., Esq.
Pamela R. Chepiga, Esq.
Charles J. Hamilton, Jr., Esq.

APPENDIX I

KRAMER, LEVIN, NAFTALIS, NESSEN, KAMIN & FRANKEL
919 THIRD AVENUE
NEW YORK, N.Y. 10022

May 4, 1994

By Hand

Honorable Robert P. Patterson, Jr.
Chairman, Grievance Committee
United States Courthouse, Room 308
Foley Square
New York, New York 10007

Re: Theodore H. Friedman

Dear Judge Patterson:

I represent Theodore H. Friedman. I am writing at this time in response to the order to show cause dated April 4, 1994, which followed an order of disbarment by the Appellate Division, First Department, dated March 22, 1994, which was to have been effective April 22, 1994. For reasons I will outline briefly, because the order of the Appellate Division remains ineffective, I respectfully suggest that the Grievance Committee of the Southern District of New York should stay any further proceedings in this matter until it is determined whether Appellate Division's decision will be reversed, as is now being urged in a pending appeal.

A notice of appeal on constitutional grounds was filed by Mr. Friedman on April 6, 1994. The appeal raises the question whether it is a violation of both federal and state due process to order an attorney's disbarment on the basis of findings supported by no more than a preponderance of the evidence. As you know, the federal courts, 40 of the states, the District of Columbia, and Rule 18(C) of the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement (1989) all require "clear and convincing evidence" or some similar standard higher than a mere preponderance. If New York should adhere to the preponderance standard, there will be a square conflict on the due process issue with the decision in In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992).

In these circumstances, we moved by order to show cause on April 20, 1994, for a stay pending appeal as well as an interim stay pending decision of said motion. The interim stay was granted by a Judge of the Court of Appeals on April 21, 1994. The Court of Appeals now has under advisement both the question of a further stay and the question whether the appeal should be heard on a plenary basis on the ground that it presents a substantial question of constitutional law. I am enclosing copies of our Jurisdictional Statement and Memorandum of Law in Support of Jurisdiction filed with the Court of Appeals.

We had received indications last week that we would hear from the Court on the stay and substantial question issues before May 1st, and I therefore delayed this letter. However, we learned on Monday from the Court's motions clerk that we would not hear from the Court of Appeals on these issues until the beginning of next week, at the earliest.

It is our submission to the New York Court of Appeals that the order of the Appellate Division should never become effective. That remains of course a matter for decision in Albany. In the meantime, it seems premature to elaborate before Your Honor's Committee the several grounds on which we would urge in any event that the New York order of disbarment should not be adopted by the Southern District of New York.

These grounds potentially would include the argument that a higher standard of proof is, as a matter of due process, required for Federal Court disbarment and that State Court disbarment, particularly when rendered pursuant to a lower standard of proof, does not constitute an automatic ground for Federal Court disbarment. It would, instead, require, we would submit, de novo hearings and proceedings within the Federal Court framework. Significant case law supports this. Matter of Sassower, 700 F. Supp. 100, 102-3 (E.D.N.Y. 1988). See also Theard v. United States, 354 U.S. 278, 281 (1957).

Separately, this Court, through the Committee on Grievances, by letter of Judge Broderick dated June 23, 1986 (copy enclosed for your convenience), disposed of a substantial portion of the charges on which the State Court order rests by the issuance of a letter of censure placed in Mr. Friedman's file. We would argue that any further discipline in the Federal Court would now be limited to consideration only of the additional "Krieger" claims considered by the State Court, and, accordingly specifically different discipline might well be considered by the Federal Court, even were the "Krieger" charges sustained on the higher standard of proof here applicable.

I recite all this only to indicate that the issues are multiple and serious. It should also be said the Mr.

Friedman takes very seriously his membership in the Bar of this Court. This Court was the focus of his intensive litigation practice during the first two decades of his professional life, with notable achievements at the District Court, Circuit Court and Supreme Court levels. It is his intention to do everything appropriate and possible to preserve his status before this Court and to demonstrate that the charges made against him are without merit and do not justify the loss of his long held standing at the Bar of this Court.

Our submission, in sum, is that the Southern District's Grievance Committee should stay its hand at least until the New York Court of Appeals has acted on our pending appeal. Because of the conflict of decisions mentioned above, an unfavorable decision by the Court of Appeals would undoubtedly be followed by a petition for a writ of certiorari. That, too, is a subject that is premature and, we would hope, academic.

We respectfully request, therefore, that this matter be held in abeyance until the Court of Appeals has acted. I undertake to inform Your Honor promptly as to the nature of such action when it occurs, and then to make appropriate further submissions suited to the circumstances as they then exist. If Your Honor and the Committee desire a different procedure, we stand ready to respond in any manner directed.

Respectfully yours,

/s/

Marvin E. Frankel

APPENDIX J

KRAMER, LEVIN, NAFTALIS, NESSEN, KAMIN & FRANKEL
919 THIRD AVENUE
NEW YORK, N.Y. 10022

May 6, 1994

By Hand

Honorable Robert P. Patterson, Jr.
Chairman, Grievance Committee
United States Courthouse, Room 308
Foley Square
New York, New York 10007

Re: Theodore H. Friedman

Dear Judge Patterson:

In my letter of May 4, 1994, concerning Mr. Friedman, I promised to keep the Court informed as to the status of his case in the State Courts. Accordingly, although I have not yet received the order, I report that I am reliably informed that the New York Court of Appeals yesterday dismissed Mr. Friedman's appeal and dismissed his application for a stay. Notwithstanding these developments, I repeat my submission that it would be appropriate and fair for the Grievance Committee of the Southern District to hold its proceedings in abeyance while we proceed to petition for a writ of certiorari and, as an incident of that, to seek a stay from Circuit Justice Thomas.

As I reported on May 4, there is substantial reason to hope that certiorari will be granted in light of a conflict with In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). Moreover, because the overwhelming majority of the states follow a standard of proof higher than New York's preponderance standard, this is a case where substantial hope of review and reversal is warranted by the pronouncement of the Supreme Court recalling "that a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions. In each of these cases in which we [Supreme Court] have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions." Rivera v. Minnich, 483 U.S. 574, 578 (1987). That course of decision reads compellingly on the circumstances of Mr. Friedman's case.

It is our intention to seek the writ of certiorari with all possible speed. My present plan, given the limits of human energy, is to file the petition by May 25, 1994. We will certainly come very close to that schedule if we do not meet it precisely. Naturally, Your Honor will be furnished with a copy of the petition when it is served and filed.

In this situation, with the press of litigation work upon Mr. Friedman and his counsel, and given the fact that the state decision remains subject to review and possible

reversal by the United States Supreme Court, I respectfully request again that this matter be held in abeyance until the Supreme Court has acted.

Respectfully yours,

/s/

Marvin E. Frankel

APPENDIX K

District Court Rules Requiring Attorney to Prove Defects in State Proceedings by "Clear and Convincing Evidence" to Avoid Reciprocal Discipline

D. Colo.:	Rule 83.6 ("clear and convincing evidence")
E.D.N.Y.:	General Rule 4 ("clear and convincing evidence")
S.D.N.Y.:	General Rule 4 ("clear and convincing evidence")

District Court Rules Imposing Burden on Attorney to Show that It "Clearly Appears" (or Equivalent Standard) that State Proceedings Are Defective to Avoid Reciprocal Discipline

N.D. Ala.:	Rule 83.1 ("clearly demonstrates")
E.D. Ark.:	App. II.D. ("clearly appears")
W.D. Ark.:	App. II.D. ("clearly appears")
D. Conn.:	Civil Rule 3 ("clearly appears")
D. Del.:	Rule 83.6 ("clearly appears")
D.D.C.:	Rule 707 ("clearly appears")

S.D. Fla.:	Attorney Discipline Rules III & IV ("clearly appears")
M.D. Ga.:	Rule 13.5 ("clearly appears")
D. Guam:	Rule 115 ("clearly appears")
D. Idaho:	Rule 83.6 ("clearly demonstrates")
S.D. Ill.:	Rule 29 ("clearly appears")
N.D. Ind.:	Rule 83.6.2 ("clearly appears")
D. Kan.:	Rule 410 ("clearly appears")
E.D. Ky.:	Rule 3 ("clearly appears")
W.D. Ky.:	Rule 3 ("clearly appears")
E.D. La.:	App. I, Rule III ("clearly appears")
M.D. La.:	App. I, Rule III ("clearly appears")
W.D. La.:	App. I, Rule III ("clearly appears")
D. Me.:	Rule 7 ("clearly appears")
D. Md.:	Rule 705 ("clearly appears")
D. Mass.:	Rule 83.6 ("clearly appears")
E.D. Mich.:	Rule 111.1 ("clearly appears")
D. Minn.:	Rule 83.6 ("clearly appears")
E.D. Mo.:	General Rule 2 ("clearly appears")

W.D. Mo.:	Rule 2 ("clearly appears")
D. Neb.:	Rule 83.5 ("clearly appears")
D.N.J.:	Rule 7 ("clearly appears")
M.D.N.C.:	Rule 503 ("clearly appears")
D.N. Mariana:	App. A, Rule 16 ("clearly appears")
S.D. Ohio:	App. I, Rule II ("clearly appears")
E.D. Okla.:	Rule 4 ("clearly appears")
W.D. Okla.:	Rule 4 ("clearly appears")
E.D. Pa.:	Civil Rule 14 ("clearly appears")
M.D. Pa.:	Rules 302, 304 ("clearly appears")
W.D. Pa.:	Civil Rule 83.6 ("clearly appears")
D. Vt.:	Civil Rule 1 ("clearly appears")
D.V.I.:	Civil Rule 83.2 ("clearly appears")
E.D. Va.:	Rule 7 ("clearly appears")
N.D. W. Va.:	Rule 1.05 ("clearly appears")
S.D.W. Va.:	General Rule 3.01 ("clearly appears")
D. Wyo.:	Rule 204 ("clearly appears")

District Courts with Rules Appearing to Impose Reciprocal Discipline "Automatically"

S.D. Cal.:	Rule 83.5(f)
N.D. Fla.:	Rule 11.1
W.D. Mich.:	Rule 21
W.D.N.Y.:	Civil Rule 83.3
E.D. Tex.:	Rule 3
S.D. Tex.:	Appendix A, Rule 3

District Courts Not Imposing Heightened Burden on Attorney to Show Defects in State Proceedings to Avoid Reciprocal Discipline

M.D. Ala.:	Rule 2
S.D. Ala.:	Rule 3
D. Alaska:	General Rule 3
D. Ariz.:	Rule 1.6
C.D. Cal.:	Civil Rule 2.6
E.D. Cal.:	Rule 184
N.D. Cal:	Rule 110-6

M.D. Fla.:	Rule 2.04
N.D. Ga.:	Rule 110-6
S.D. Ga.:	Rule 505
D. Haw.:	Rule 110-4
C.D. Ill.:	Rule 1.3
N.D. Ill.:	General Rule 3.51
S.D. Ind.:	General Rule 83.5
N.D. Iowa:	Rule 5
S.D. Iowa:	Rule 5
N.D. Miss.:	Rule 1
S.D. Miss.:	Rule 1
D. Mont.:	Rule 110-5
D. Nev.:	Rule 10-7
D.N.H.:	Rule 4
D.N.M.:	Civil Rule 83.10
N.D.N.Y.:	Civil Rule 83.4
E.D.N.C.:	Rule 2.10
W.D.N.C.:	No applicable local rule

D.N.D.:	Rule 79.1
N.D. Ohio:	Rule 1:5.2
N.D. Okla.:	Civil Rule 83.3
D. Ore.:	Rule 110-6
D.P.R.:	Rule 211
D.R.I.:	Rule 4
D.S.C.:	Rule 2.09
D.S.D.:	Rule 83.2
E.D. Tenn.:	Rule 83.7
M.D. Tenn.:	Rule 1
W.D. Tenn.:	Rule 1
N.D. Tex.:	Rule 13.2
W.D. Tex.:	Rule AT-1
D. Utah:	Rule 103-5
W.D. Va.:	Rule 2
E.D. Wash.:	Rule 1.2
W.D. Wash.:	General Rule 2
E.D. Wis.:	Rule 2.05 (None)

W.D. Wis.: No applicable local rule

APPENDIX L

States Employing "Clear and Convincing" or Similar Intermediate or Higher Standard of Proof in Attorney Disciplinary Proceedings

ALABAMA	*Huckaby v. Alabama State Bar*, 631 So.2d 855 (Ala. 1994) (clear and convincing).
ARIZONA	*Matter of Higgins*, 884 P.2d 1094 (Ariz. 1994) (clear and convincing).
CALIFORNIA	*In re Morse*, 900 P.2d 1170 (Cal. 1995) (clear and convincing).
COLORADO	*People v. Distel*, 759 P.2d 654 (Colo. 1988) (clear and convincing).
CONNECTICUT	*Weiss v. Statewide Grievance Comm.*, 633 A.2d 282 (Conn. 1993) (clear and convincing).
DELAWARE	*Matter of Berl*, 540 A.2d 410 (Del. 1988) (clear and convincing).
DISTRICT OF COLUMBIA	*In re Thompson*, 583 A.2d 1006 (D.C. 1990) (clear and convincing).

FLORIDA	*Florida Bar v. Marable*, 645 So. 2d 438 (Fla. 1994) (clear and convincing).
GEORGIA	*Cushway v. State Bar*, 170 S.E.2d 732 (Ga. 1969) (beyond a reasonable doubt), *cert. denied*, 398 U.S. 910 (1970).
HAWAII	*Office of Disciplinary Counsel v. Rapp*, 777 P.2d 710 (Haw. 1989) (clear and convincing).
IDAHO	*Matter of Jenkins*, 816 P.2d 335 (Idaho 1991) (clear and convincing).
ILLINOIS	*In re Blank*, 585 N.E.2d 105 (Ill. 1991) (clear and convincing).
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OREGON	*In re Altstatt*, 897 P.2d 1164 (Or. 1995) (clear and convincing).
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WEST VIRGINIA	*Lawyer Disciplinary Bd. v. Beveridge*, 459 S.E.2d 542 (W.Va. 1995) (clear and convincing).
WISCONSIN	*Matter of Disciplinary Proceedings against Camacho*, 375 N.W.2d 204 (Wis. 1985) (clear and satisfactory).
WYOMING	*Meyer v. Norman*, 780 P.2d 283 (Wyo. 1989) (clear and convincing).

States Employing Preponderance Standard in Attorney Disciplinary Proceedings

ALASKA	*Disciplinary Matter Involving Walton*, 676 P.2d 1078 (Alaska 1983) (preponderance), *appeal dismissed*, 469 U.S. 801 (1984).
ARKANSAS	*Petition of Shannon*, 621 S.W.2d 853 (Ark. 1981) (preponderance).
KENTUCKY	*Kentucky Bar Ass'n v. Heavrin*, 573 S.W.2d 916 (Ky. 1978) (preponderance), *cert. denied*, 441 U.S. 946 (1979).
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No. 95-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

THEODORE H. FRIEDMAN
Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Southern District and the Second Circuit failed to give independent consideration to petitioner's state court disbarment, as required by *Selling v. Radford*, 243 U.S. 46 (1917), where petitioner failed to present clear and convincing evidence that the state court proceeding was flawed.

2. Whether a federal court in a reciprocal disciplinary proceeding, after an independent examination of the issues, may discipline a federal practitioner based on state court disciplinary findings proved, in accordance with state law, by a preponderance of the evidence.

3. Whether an attorney who has been found guilty of multiple acts of serious professional misconduct may challenge his reciprocal disbarment in federal court by asserting that he has already been disciplined at the federal bar for some (but not all) of those acts, where the state tribunal entering the original order of disbarment has explicitly stated that any one of the attorney's many misdeeds would constitute sufficient grounds for disbarment.

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No. 95-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THEODORE H. FRIEDMAN,
Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Grievance Committee for the Southern District of New York respectfully urges this Court to deny the petition for a writ of certiorari filed in this action by petitioner Theodore H. Friedman, a disbarred lawyer.

OPINIONS BELOW

Petitioner Friedman seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit (Petitioner's Appendix A, pp. 1a-7a), which affirmed an order of the United States District Court for the Southern District of New York suspending petitioner from the practice of law in that district "until such time as he is reinstated to practice law in the State of New York." (Petitioner's Appendix C, pp. 10a-11a). The district court's order of reciprocal discipline, entered after notice and an opportunity to be heard, followed a final order of disbarment by the New York Appellate Division, First Department (Petitioner's Appendix E, pp. 14a-38a), which sustained 13 separate charges of professional misconduct found against petitioner by a Special Referee. (Petitioner's Appendix F, pp. 45a-70a).

Petitioner sought direct review of his state disbarment in the New York Court of Appeals, which dismissed his appeal for want of a substantial constitutional question. (Petitioner's Appendix D, pp. 12a-13a). Petitioner also sought review of his state disbarment proceedings in this Court, which denied his petition for a writ of certiorari. 115 S.Ct. 81 (1994). On the same day it denied the petition for a writ of certiorari, this Court entered an order suspending petitioner from practice in this Court and requiring him to show cause why he should not be disbarred. 115 S.Ct. 48 (1994). Following receipt of a response from petitioner, this Court disbarred petitioner as a result of the same charges underlying the decision of the Second Circuit for which review is sought here. 115 S.Ct. 629 (1994).

JURISDICTION

Respondent agrees that this Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Petitioner purports to challenge Rule 4 of the General Rules of the United States District Court for the Southern District of New York. (Petitioner's Appendix G).

STATEMENT OF THE CASE

1. Petitioner's New York Disbarment

Petitioner is a New York lawyer who was disbarred after protracted disciplinary proceedings in which he was found by both the Special Referee hearing his case and a unanimous five-judge panel of the New York Appellate Division, First Department, to have engaged in professional misconduct going "to the heart of [the] ethical responsibility of a practicing lawyer." *In re Friedman*, 196 A.D. 2d 280, 295-296, 609 N.Y.S.2d 578, 586-587 (1st Dep't 1994). The findings are multiple and serious – ranging from suborning perjury of witnesses to submitting false affidavits – and demonstrate "a contempt for the legal and judicial process as well as for the profession." *Id.*

The Special Referee's report and the Appellate Division's opinion, both of which are reprinted in petitioner's Appendix (*see* Appendix 14a-70a), contain lengthy discussions as to the underlying facts surrounding each allegation and finding of misconduct. Because the issue here concerns the propriety of the Second Circuit's imposition of reciprocal federal discipline, the lengthy record of the state disciplinary proceedings, which includes some 4,000 pages of hearing testimony plus

hundreds of documentary exhibits, may be briefly summarized.

Petitioner was charged in 1990 with professional misconduct in connection with his representation of personal injury claimants in two matters. The first of these cases, *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 (PNL), was a wrongful death action tried in the Southern District of New York in the early 1980's. The dispute centered about an unreceived exhibit, prepared by petitioner's expert on the subject of damages, which was discovered to have been improperly placed in the jury room during deliberations.

Petitioner was charged with four counts of professional misconduct by a panel of attorneys appointed to investigate the matter by the Committee on Grievances of the Board of Judges of the Southern District of New York. Two of the counts related to petitioner's filing of a false affidavit blaming his co-counsel for having placed the unreceived exhibit in the jury room; one related to petitioner's false testimony at a hearing conducted into the matter by the federal judge presiding over the case; and one related to the presence of the unauthorized exhibit in the jury room, specifically alleging that petitioner had been the responsible party.

Pursuant to a plea bargain arrangement, petitioner admitted one of the charges – filing a false and misleading affidavit without personal knowledge or factual basis – in exchange for an agreement by the Federal Grievance Committee to drop the other charges. Petitioner was not the subject of an evidentiary hearing on the other three charges, although he was put on notice

that the unadmitted charges might be the basis for further disciplinary proceedings.

The same events were then made the subject of six counts of wrongdoing by the New York state disciplinary authorities, which conducted an independent review of the matter. The first charge, alleging that petitioner had caused the exhibit to be in the jury room, was found by the Special Referee not to have been proved by a fair preponderance of the evidence. (Petitioner's Appendix F, pp. 48a-49a). However, the Special Referee sustained the remaining counts, including those charging petitioner with knowing submission of a false affidavit and knowing false testimony given during the hearing. (*Id.* at pp. 49a-53a). In all material respects, the Appellate Division confirmed the report of the Special Referee. (Petitioner's Appendix E, pp. 16a-23a, 37a-41a).

The second set of charges concerned the case of *Estate of Aron Krieger v. City of New York*, Index No. 6228/80, another wrongful death matter growing out of an elevator accident in a city-owned building. It was alleged, and the Special Referee found, that petitioner had improperly coached a witness to testify falsely about various matters and to give "disinformation" to petitioner's adversary. The Special Referee also found that petitioner had failed to disclose to the Court and jury that another witness had testified falsely about significant credibility matters. (Petitioner's Appendix F, pp. 53a-62a).

Additional findings against petitioner were that he failed to exercise reasonable supervision over his private investigator; that he engaged in unethical fee splitting; and that he had paid, or acquiesced in the payment of,

excessive and unreasonable compensation to fact witnesses. (*Id.*) In all, the Special Referee determined nine of eleven *Krieger* charges against petitioner. (*Id.*) The Appellate Division affirmed in all respects. (Petitioner's Appendix E, pp. 23a-37a, 39a-41a).

Petitioner sought to appeal his disbarment as of right to the New York Court of Appeals. By order dated May 3, 1994, the Court of Appeals dismissed the appeal on the ground that it presented no substantial constitutional question. (Petitioner's Appendix D, pp. 12a-13a). A motion for reargument in the Appellate Division, submitted April 21, 1994, was likewise denied except to the extent of changing two words in the Court's opinion. With the finality of the New York disbarment order, petitioner petitioned for a writ of certiorari from this Court, a request which was denied on October 4, 1994. 115 S.Ct. 81 (1994).

2. The Southern District Reciprocal Disciplinary Proceedings

Upon notification of petitioner's state disbarment, the Southern District Grievance Committee entered a "show cause" order on April 4, 1994, directing petitioner to demonstrate why reciprocal federal discipline should not be imposed pursuant to Southern District General Rule 4(d). The order invited petitioner to make a submission in writing by May 4, 1994. Petitioner was thus given 30 days to submit whatever factual or legal contentions he deemed appropriate as to why the imposition of reciprocal disbarment was unwarranted.

On May 4, 1994, petitioner's counsel wrote to the district court requesting a stay of all federal disciplinary

proceedings until the New York Court of Appeals had acted on petitioner's then pending appeal from the Appellate Division's disbarment order. (Petitioner's Appendix I, pp. 81a-84a). The letter went on, however, to reveal two "potential" arguments in support of the position that the New York order of disbarment should not be adopted by the Southern District of New York. Citing cases and elaborating in some detail, petitioner contended, first, that the higher standard of proof for federal court disbarment would require a *de novo* hearing and, second, that any further discipline in the federal court should not be based on the *Mowen* charges, which were the subject of the earlier Southern District disciplinary proceeding. (*Id.*)

Two days later, May 6, 1994, petitioner's counsel wrote again to the Southern District, informing it that the New York Court of Appeals had dismissed petitioner's direct appeal for want of a substantial constitutional question. (Petitioner's Appendix J, pp. 83a-87a). Notwithstanding this development, petitioner suggested that it would be "appropriate and fair" for the Southern District to continue to hold its proceedings in abeyance while he prepared and filed a petition for a writ of certiorari. It was again urged, in the same letter, that New York's preponderance-of-the-evidence standard, on which the state court disbarment order was based, was inconsistent with federal constitutional due process. (*Id.*)

Having given petitioner ample notice and an opportunity to be heard, having considered his submissions, which included detailed arguments going to the merits, and having been led to believe that the Appellate Division's order of disbarment was final, the Southern District Grievance Committee issued an order

dated May 26, 1994, directing that "respondent [Mr. Friedman] be suspended from practice in the United States Court for the Southern District of New York until such time as he is reinstated to practice law in the State of New York." (Petitioner's Appendix C, pp. 10a-11a).

3. The Second Circuit's Affirmance

On appeal, the Second Circuit affirmed the district court's suspension order. Joining the numerous courts (including this Court) that have rejected petitioner's challenge to his disbarment, the Second Circuit concluded that petitioner had been given an ample opportunity to be heard in the district court. It noted that petitioner had elected to respond to the show cause order by demanding an extension of time "which the district court was in no way obligated to grant." (Petitioner's Appendix A, p. 6a). It also found that petitioner had presented the "substance of reasoned arguments" in opposition to the suggestion of disbarment. (*Id.* at p. 5a). The district court therefore had before it "the relevant facts and detailed legal arguments" when it made its decision. (*Id.* at p. 6a).

The Second Circuit determined that petitioner had failed to prove "by clear and convincing evidence" – as required by Southern District Rule 4(g) – that "the New York procedures were wanting." (Petitioner's Appendix A, p. 6a). On this point, the court found persuasive that this Court, following precisely the procedures employed by the Southern District, had also disbarred petitioner and implicitly rejected his claim that a preponderance-of-the-evidence standard of proof deprived him of due process. (*Id.* at pp. 6a-7a).

Finally, the Second Circuit rejected petitioner's preclusion argument, finding that "other serious and substantial charges" before the district court warranted suspension, even without consideration of the *Mowen* charges that were the subject of the earlier disciplinary proceeding in the Southern District. (*Id.* at p. 7a).

4. Petitioner's Reciprocal Disbarment By This Court

On October 3, 1994, this Court, acting pursuant to Rule 8.1 of the Rules of the Supreme Court, suspended petitioner from practice before it and ordered him to show cause why he should not be disbarred. *In re Friedman*, 115 S.Ct. 48 (1994). Petitioner submitted a response, and on December 5, 1994, this Court disbarred him. *In re Friedman*, 115 S.Ct. 629 (1994). This Court specifically cited the New York disciplinary action as the basis for its disbarment. *Id.*

REASONS FOR DENYING THE WRIT

Petitioner advances three main arguments to show that this case is certworthy. He first contends that Southern District Rule 4(g) conflicts with governing precedent of this Court and with rulings of other circuits because it imposes upon the accused attorney the burden of establishing by clear and convincing evidence that the state court discipline is erroneous. Second, he argues that the Second Circuit's approval of reciprocal federal disbarment based on a "preponderance of the evidence" standard conflicts with other circuits and should be disapproved. And finally, he urges that the Southern District's federal disbarment was a form of "double

jeopardy" because it allegedly punished him twice for the same conduct arising out of the *Mowen* case.

The "conflicts" identified by petitioner are more illusory than real. Even a casual reader of the authorities on which petitioner relies can see that the Second Circuit's decision in this case is fully consistent not only with rulings of the other courts of appeals, but with the authoritative pronouncements of this Court. Even if there were a weak split – which there is not – the questions presented for review have only rarely arisen in the lower federal courts and are unlikely to spawn recurring problems. The issue, thus, does not warrant review by the United States Supreme Court.

More fundamentally, even if petitioner had raised a certworthy issue, this case would not be an appropriate vehicle for settling it. The imposition of a heightened burden of proof in reciprocal discipline cases would not be outcome determinative here. Indeed, the burden of proof could not be raised high enough to shield petitioner from the overwhelming evidence against him. That evidence permitted only one conclusion – petitioner is guilty of serious professional misconduct for which he received appropriate punishment.

I.

SOUTHERN DISTRICT RULE 4(g) IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH RULINGS OF OTHER CIRCUITS

A. The Alleged Conflict With This Court

Petitioner's feature argument is that the Second Circuit reached a decision in conflict with governing precedent of this Court. Specifically, petitioner alleges that the Second Circuit's interpretation of Southern District Rule 4(g) improperly assigned to him the burden of showing good cause why he should not be disbarred. According to petitioner, Rule 4(g) conflicts with a line of this Court's decisions, beginning with *Selling v. Radford*, 243 U.S. 46 (1917), which purportedly place an affirmative duty on the federal district courts to make an independent examination of the state disciplinary record for legal and factual errors. *See also In re Ruffalo*, 390 U.S. 544, 547, *reh'g denied*, 391 U.S. 961 (1968); *Theard v. United States*, 354 U.S. 278, 281 (1957). Apparently, in petitioner's view, the lower federal courts are required to conduct such an independent examination even as to issues not specifically called to the court's attention by the accused attorney.

It is true that *Selling* and its progeny established the independent disciplinary power of the federal judiciary and articulated the principles governing the imposition of reciprocal discipline in federal courts. But nothing in these opinions even remotely suggests that this

independent disciplinary power carries with it a duty to requisition the entire state disciplinary record and to examine it *de novo* for legal and factual errors.

To the contrary, *Selling* itself makes clear that the burden is squarely on the affected attorney to submit to the federal court those portions of the state record which he believes are in need of independent examination. *Selling v. Radford*, 243 U.S. at 51-52 (the disbarred attorney's burden is "to file the record or records of the state court within thirty days . . . by printed brief, considering the record intrinsically, to point out any ground within the limitations stated which should prevent [the federal court] from giving effect to the conclusions established by the action of the [state court]"). Indeed, this Court's own procedures of reciprocal discipline place the burden upon the accused attorney to show good cause why he should not be disbarred. *In re Isserman*, 345 U.S. 286, 288-289, 291 (1953), *set aside on other grounds*, 348 U.S. 1 (1954).

Any other rule would place an intolerable burden on the federal courts. It would put them in the business of virtually re-trying the hundreds of reciprocal discipline cases that are processed each year. It would mean, for example, that the Southern District in this case would have been required to sift through the mammoth record of petitioner's state disciplinary proceeding (some 4,000 pages of transcript, not to mention hundreds of exhibits) to satisfy itself that the discipline imposed on petitioner was warranted – even as to those matters not specifically challenged by petitioner. Nothing in the *Selling, Theard, or Ruffalo* decisions can be read to impose such a duty on the federal judiciary.

The district courts in the Second Circuit, like the district courts elsewhere, have developed a set of procedures that properly balance the twin teachings of *Selling* and *Theard* that although discipline imposed by a state "brings title deeds of high respect," it is not conclusively binding on the federal courts. Typically, upon receipt by the district court of a state judgment or order demonstrating that a federal practitioner has been disciplined by another court, the district court issues an order to show cause with a 30-day return date.

Upon expiration of the 30-day period, the court generally imposes the identical discipline unless the attorney demonstrates, or the court finds, that one of the *Selling* exceptions is present. The *Model Rules of Federal Disciplinary Enforcement*, developed and published by the American Bar Association, embrace the same concept, stating that the federal court "shall" impose the "identical discipline" unless it "clearly appears" that one of the recognized exceptions is present.

These are the very procedures followed by the district court here. Upon receipt by the court of notification of petitioner's disbarment, the Southern District issued an order to show cause directing petitioner to make a written submission within 30 days. That order provoked at least two letters from petitioner's counsel, both of which were drafted to appear to address only the issue of a stay, but which in fact covered the merits of petitioner's objections to the state disbarment order.

Having received petitioner's submissions, the Southern District became charged under *Selling* with the responsibility of considering those submissions in making an independent determination as to whether reciprocal

discipline (or discipline of a lesser degree of aggravation) was warranted. This is exactly what the Court did. Finding no merit in petitioner's constitutional and other arguments, the Southern District *independently determined* to accept the state disciplinary findings. Accordingly, on May 26, 1994, it entered an order suspending petitioner from practice in the Southern District until he had been reinstated in New York. The Second Circuit affirmed on essentially the same grounds.

Thus, contrary to petitioner's contention, both the Southern District and the Second Circuit exercised the duties assigned to them by *Selling, Theard* and *Ruffalo.* They conducted an "independent intrinsic examination" of the state disciplinary record. Although they did not *sua sponte* requisition the state disciplinary record and examine it anew for legal and factual errors, they exercised *independent judgment on those issues presented for consideration.* Nothing in this Court's opinions requires more.

B. The Alleged Conflict With Rulings Of Other Circuits

Petitioner also contends that the Second Circuit's ruling conflicts with decisions of the Tenth and Eleventh Circuits. He cites *In re Phelps*, 637 F.2d 171 (10th Cir. 1981), and *Greer's Refuse Servs., Inc. v. Browning-Ferris Industries*, 782 F.2d 918 (11th Cir. 1986), both of which stand for the settled proposition, with which we do not disagree, that the district court in a reciprocal disciplinary matter must give independent consideration to a state disbarment record. But the Southern District and the Second Circuit did give independent consideration to petitioner's state court disbarment. Indeed, the Second

Circuit expressly cited *Selling* for the proposition that the district court is required to examine the state proceeding for consistency with the requirements of due process. (Petitioner's Appendix A, p. 6a).

Although paraded as an inter-circuit conflict, the dispute here is not about principles. All of the courts of appeals, including the Second Circuit, agree that the federal district court must make an independent determination as to whether disbarment is warranted in a reciprocal discipline case. There is no "conflict" on this basic proposition. What petitioner challenges is the *application of this principle* to the facts of this case. He contends that the Southern District and Second Circuit did not exercise independent judgment, but "ministerially and mechanically imparted the disbarment order of the New York state court into the separate and independent jurisdiction of the federal district court." (Petition, p. 12). Whatever the correctness of this assertion – and we certainly believe it to be incorrect – it does not present an issue worthy of this Court's certiorari jurisdiction. At most, it shows that the district court and Second Circuit misapplied settled law, not that the Second Circuit is "out of step" with this Court or the other courts of appeals on the fundamental teachings of *Selling* and subsequent cases.

C. The Question Is Not Important

Having set up a false conflict, petitioner proceeds to argue that this Court should take this case to resolve the "conflict" among the circuits and establish a uniform rule for the federal courts. As evidence of this "conflict," petitioner includes an appendix which lists the purportedly divergent rules in the various federal district

courts on the subject of reciprocal discipline. (*See* Petitioner's Appendix K, pp. 88a-94a).

Closer examination, however, reveals that this purported "conflict" is contrived. In *Selling v. Radford*, 243 U.S. 46 (1917), this Court stated that

> we should recognize the condition created by the [disciplinary] judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a *clear conviction* on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with . . . principles of right and justice[.]

243 U.S. at 50-51 (emphasis added).

As can be readily seen, the "clear and convincing" language of Southern District Rule 4(g), and the similar language in dozens of other local district rules, logically derive from the "clear conviction" language of *Selling*, which has stood for over three-quarters of a century as the model to be used by the federal courts in reciprocal discipline cases. Indeed, most district court rules are

patterned after the ABA's *Model Rules of Federal Disciplinary Enforcement*, which themselves are based on the passage of this Court's *Selling* opinion quoted above.

There is, therefore, no "conflict" for this Court to resolve. The lower courts are consistent in their approach to the question of reciprocal discipline, an approach that derives directly from this Court's established precedent. From a certiorari standpoint, this case is not unusual or important in any respect. The only thing unusual about it is that a prominent New York lawyer has been disbarred through the application of settled principles to a compelling record of multiple and serious ethical violations.

II.

THE SECOND CIRCUIT'S APPROVAL OF RECIPROCAL FEDERAL DISCIPLINE BASED ON A STATE DISBARMENT PROVED BY A "PREPONDERANCE OF THE EVIDENCE" DOES NOT CONFLICT WITH OTHER CIRCUITS

As an alternative ground for certiorari, petitioner asserts that the Second Circuit's reliance on a disbarment proved in the New York state proceeding by a "preponderance of the evidence" conflicts with other circuits and should be disapproved. In response to this argument, we make the following points:

First, this Court, in denying certiorari in petitioner's state disbarment proceedings, has already declined to consider whether the "clear and convincing" standard is mandated in attorney disbarment proceedings. *In re Friedman*, 115 S.Ct. 81 (1994).

Second, the "conflict" identified by petitioner is again manufactured, not real. Virtually all of the circuit decisions cited by petitioner address the issues of the burden of proof in original disciplinary proceedings in federal court. *See, e.g., In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992) (original discipline proceeding); *NASCO, Inc. v. Calcasieu Television and Radio*, 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (same); *In re Thalheim*, 853 F.2d 383, 390 (5th Cir. 1988) (same). Not one even addresses, let alone rejects, the standards in reciprocal discipline cases which originate in the state courts.

Because this Court is confronted with the considerably narrower issue of the sufficiency of the standard of proof in reciprocal disciplinary proceedings, the only relevant analysis is that set forth in *Selling v. Radford*, 243 U.S. 46, 50-51 (1917). *Selling* requires rejection of state discipline only when there has been a clear and convincing failure of due process or proof – or some other conflict with "the principles of right or justice." *Id.* An application of the *Selling* factors to the present matter, however, reveals neither constitutional infirmity nor conflict with "the principles of right or justice." *Id.* Indeed, petitioner has enjoyed a plethora of process throughout all stages of the proceedings, both state and federal.

Third, petitioner is wrong to suggest that a clear and convincing standard is mandated by federal law. "The norm in federal law is the preponderance of the evidence, even when the claim is fraud and the suit may visit ruin and disgrace on the loser." *In re Palmisano*, 70 F.3d 483, 486 (7th Cir. 1995) (upholding the federal court's reciprocal discipline of an attorney who was

disbarred by the Supreme Court of Illinois); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1982) (upholding the use of the preponderance standard in SEC proceedings concerning allegations of fraud); *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (upholding the use of the preponderance standard where the sanctions imposed included an order permanently barring an individual from practicing his profession).

Fourth, petitioner requests that this Court impose a heightened standard of proof upon all federal disbarment proceedings without offering a shred of empirical evidence that reliance on a preponderance of evidence standard results in wrongful disbarment of attorneys from the federal courts. Uniform imposition of a clear and convincing standard on federal disbarment proceedings would increase the amount of judicial resources required to discipline federal practitioners in reciprocal cases. Thus, in the absence of any demonstrable need for a uniform, heightened standard of proof in federal disbarment proceedings, petitioner's request for such a standard betrays an insensitivity to the reality of scarce federal judicial resources.

Even assuming that the preponderance of evidence standard results in more disbarments or sanctions against attorneys, courts are not obligated to "sacrifice the interests of litigants to reduce the risk of erroneous imposition of costs on attorneys; to the contrary, the interests of litigants deserve the greater protection." *In re Palmisano*, 70 F.3d 483, 486-87 (7th Cir. 1995). Contrary to petitioner's assertion, a high burden of proof is appropriate only when the costs of error are one-sided. *Id.* at 486; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1982) ("[a] preponderance-of-the-evidence

standard allows both parties to 'share the risk of error in roughly equal fashion'") (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Although disbarment is costly for an attorney, "permitting an incompetent or otherwise inappropriate person to practice law is costly for clients and the administration of justice." *In re Palmisano*, 70 F.3d 483, 486 (1995).

Finally, inviting this Court to impose a heightened standard of proof on federal reciprocal disciplinary proceedings overlooks this Court's deference to the broad discretion accorded to district courts for purposes of regulating their membership. *Frazier v. Heebe*, 482 U.S. 641, 645 (1986) ("We begin our analysis by recognizing that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business"); *see also In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988) ("It is well-settled that federal district courts are bound by their own disciplinary rules when proceeding against attorneys for violation of ethical standards.") (citations omitted). Moreover, Congress has also provided in 28 U.S.C. § 2071, that district courts may prescribe rules for the conduct of their business. *Id.* The authority provided in sec. 2071 includes the authority of a district court to regulate the membership of its bar. *Id.* (citing 28 U.S.C. § 1654). Neither Supreme Court precedent nor federal statutes place a premium on uniformity of attorney regulation.

III.

THE FEDERAL SUSPENSION ORDER IS WARRANTED EVEN WITHOUT CONSIDERATION OF THE *MOWEN* CHARGES

In his final attempt to persuade this Court that his case is certworthy, petitioner argues that he has been twice punished for the same conduct – in contravention of the prohibition against double jeopardy. It is true, as petitioner indicates, that the state disciplinary order rested in part on the *Mowen* charges – filing a knowingly false affidavit and giving false testimony at a hearing before a Southern District Court Judge. *In re Friedman*, 609 N.Y.S.2d 578 (1994). It is equally true, however, that the *Krieger* findings, standing alone, were sufficient to warrant disbarment. Indeed, the Appellate Division, in rendering its decision, stated: "Any one of these many serious violations would be ground for removal from the roll of attorneys." *Id.* at 586.

The New York Appellate Division in fact sustained thirteen counts of misconduct against the petitioner. Of these charges, the *Krieger* violations alone included several acts of intentional dishonesty, including the solicitation of false testimony from a fact witness; the failure to reveal materially false testimony that petitioner knew to be untrue; the failure to take appropriate remedial action with regard to unethical and illegal behavior of a private investigator; and the approval of excessive payments of money to fact witnesses. *Id.* These charges, many of which were supported by a tape-recorded conversation of petitioner asking a witness to

lie, comprise some of the most serious findings of misconduct.

Thus, even if this Court were to consider imposing a uniform standard of proof for federal attorney disciplinary proceedings, this case is inappropriate for review of that issue. Many of petitioner's ethical violations were supported by undisputed facts – indeed, with respect to the *Krieger* charges, petitioner admitted several of the essential allegations against him. A heightened standard of proof would not have been outcome determinative in this case – especially in light of the Appellate Division's finding that "there is *ample support* for the Special Referee's findings that [petitioner] is guilty of multiple serious violations of the Code of Professional Responsibility." *Id.* at 585 (emphasis added).

CONCLUSION

For the foregoing reasons, petitioner's petition for a writ of certiorari should be denied.

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No. 95-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THEODORE H. FRIEDMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

THE CONFLICTS ARE REAL

The respondent acknowledges, albeit grudgingly, that the circuits disagree on the standards for disbarment of lawyers by federal courts in reciprocal discipline cases. Respondent describes it as a "weak split" (Br. in Opp. 11) without explaining how the "strength" of a conflict is to be

measured and why its alleged "strength" or "weakness" is in any manner relevant. Determining whether there is a circuit conflict is not a matter of degree.

A. Local Rule 4(g) Conflicts with Decisions of Other Circuits and of this Court. — The local rule of the Southern District of New York — emulated *in haec verba* or in substance in many other federal jurisdictions (see Pet. App. 88a-91a) — instructs district courts automatically to discipline an attorney who has been subjected to state discipline unless he provides "clear and convincing evidence" to the contrary. The Tenth and Eleventh Circuits, in *In re Phelps*, 637 F.2d 171, 176 (10th Cir. 1981), and in *Greer's Refuse Servs., Inc. v. Browning-Ferris Indus.*, 782 F.2d 918, 921 (11th Cir. 1986), permit federal discipline only after the federal court has "independently" examined the state court's record and grounds for imposing discipline — thereby precluding automatic disbarment. *Phelps* expressly rejected any presumption of correctness for the state-court action. Here, there was no independent examination of the state-court record, which was not even physically before the district court. The procedure followed in this case and the judgment imposed by the courts below would simply not be possible in the Tenth or Eleventh Circuits.

The rule applied in those Circuits does not require federal courts to "sift through the mammoth record" in reciprocal-discipline cases, as the respondent asserts (Br. in Opp. 13). Nor does it authorize consideration of issues "not specifically called to the court's attention by the accused attorney" — another of the respondent's extreme mischaracterizations of our position (Br. in Opp. 12). We recognize that the disciplined attorney has the burden to come forward in federal court and specify the flaw or flaws in the state disciplinary proceeding. But once he does so, as petitioner did, the evidentiary burden is on those seeking to

discipline him to meet the standard consistently applied in federal courts.

This Court's cases emphasize the distinctiveness of the federal district court bar and require the federal court to exercise an independent disciplining authority before disbarring an attorney. That is the clear lesson of *In re Ruffalo*, 390 U.S. 544, 547 (1968), and *Theard v. United States*, 354 U.S. 278, 281 (1957).

Respondent contends that the "clear and convincing" standard of the challenged district court rule is justified by this Court's statement in *Selling v. Radford*, 243 U.S. 46, 50-51 (1917), that a federal court should reject a state-court's discipline if the federal court has a "clear conviction" that the state-court's factual conclusion is erroneous (Br. in Opp. 17). But the quoted language does not support the respondent's interpretation. This Court said in *Selling* that "an *intrinsic* consideration of the state record" must first be conducted (243 U.S. at 50, emphasis added), and that only after such a consideration may the federal court (or the Supreme Court) discipline the attorney unless the state's factual conclusions are deemed erroneous under the quoted standard. That is a far cry from accepting the state court's determination unless the disciplined attorney proves his case by clear and convincing evidence — the standard of Rule 4(g) of the Southern District of New York.

B. The Failure to Require Clear and Convincing Proof to Support Disbarment Conflicts with Decisions of Other Circuits. — Respondent declares that "*virtually* all" the precedents petitioner cites for the proposition that disbarment in federal courts requires proof by clear and convincing evidence are "original disciplinary proceedings in federal court" rather than reciprocal-discipline cases. Indeed, respondent claims that "[n]ot one" of our cases

"even addresses . . . the standards in reciprocal discipline cases which originate in the state courts" (Br. in Opp. 19). But *In re Phelps, supra,* which the respondent conveniently ignores, was a reciprocal-discipline case in which the court of appeals permitted federal discipline only if the proof of culpability met the clear-and-convincing standard.

Even if the directly conflicting holding of *Phelps* is disregarded, respondent does not explain why the many federal decisions holding the clear-and-convincing standard applicable to federal disbarment proceedings are inapplicable to reciprocal disciplinary cases. This Court has insisted that federal courts' authority over their bars is independent of the state courts. It follows that federal courts may not uncritically apply a state-court disbarment decision that does not satisfy the standard of proof that would govern if the federal court were imposing discipline in the first instance. That is why respondent can cite no reported decision other than this one in which a federal court has disbarred or indefinitely suspended an attorney against whom charges have never been proved by clear and convincing evidence.

Respondent's reliance on the Seventh Circuit's recent decision in *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995), is completely misplaced. Respondent implies that *Palmisano* holds that application of the clear-and-convincing standard of proof is not required in reciprocal discipline cases. But the Seventh Circuit did not even consider that issue in *Palmisano*, because the state court *had applied* the clear-and-convincing standard, and the facts were undisputed. *See* 70 F.3d at 486. The Seventh Circuit held only that the beyond-a-reasonable-doubt standard is not required for disbarment — a proposition no serious litigant contests. To the extent the Seventh Circuit's opinion might be read to suggest that the clear-and-convincing standard is not required in federal disbarment proceedings, any such suggestion is pure dicta

and contradicts the Seventh Circuit's long-established precedent. *In re Fisher*, 179 F.2d 361 (7th Cir.), *cert. denied*, 340 U.S. 825 (1950). If anything, the *Palmisano* court's observations on the standard of proof, which are seemingly inconsistent with (1) the Fifth Circuit's holding in *In re Medrano*, 956 F.2d 101 (5th Cir. 1992), (2) the Tenth Circuit's holding in *In re Phelps*, *supra*, (3) the Seventh Circuit's own decision in *Fisher*, *supra*, and (4) the other decisions cited in our petition, are a further indication of the need for guidance from the Court on this issue.[1]

II

THE ISSUES ARE IMPORTANT

On the one hand respondent asserts that the standard of the challenged Rule 4(g) is in widespread use and is supported by the ABA Model Rules of Disciplinary Enforcement. On the other hand, respondent asserts that the validity of the Rule is unimportant (Br. in Opp. 16-18). These are contradictory propositions, and both cannot be true. If, as we have shown, there are circuits that have rejected imposing such a burden of proof on an attorney, and if that burden is specified by the rules of numerous district

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[1] Respondent erroneously asserts that *Steadman v. SEC*, 450 U.S. 91 (1981), and *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), rejected the clear-and-convincing standard of proof in like circumstances. This Court concluded in *Steadman* that because Congress had mandated use of the preponderance standard in formal adjudications under the Administrative Procedure Act, the courts were not free to choose a different standard. In *Huddleston*, the Court considered the proper standard of proof for a civil damages action, in which the balance of interests is decidedly different than in a disciplinary proceeding affecting an individual's livelihood.

courts, the validity of the burden presents an important question.

Nor is it true that this Court declined to address any of the issues presented by this petition when it denied certiorari in *In re Friedman*, 115 S. Ct. 81 (1994). The issue presented at that juncture was whether an attorney could constitutionally be disbarred by a *state* court with less proof than meets the clear-and-convincing standard. That is a different issue than the questions presented at this stage, when the Court is considering what standard of proof is required for a federal disbarment, and whether a federal court should routinely and automatically follow the state court's disciplinary lead.

Finally, the respondent argues that "uniformity of attorney regulation" is not required in the federal courts and that each federal bar should be able to regulate its own membership according to its own standards (Br. in Opp. 21). Whether this should, indeed, be the law — thereby subjecting attorneys to different disciplinary standards in federal courts across the country — is surely an important question that deserves the attention of this Court. It appears to conflict with the decisions of this Court in *Ruffalo* and *Theard*, which articulated and applied a distinct federal standard and did not suggest that federal district courts were at liberty to utilize varying standards of proof. Indeed, respondent's position is at odds with the very decision on which respondent purports to rely. In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Court emphasized the importance of exercising its inherent supervisory authority to ensure the fairness and consistency of district court rules.

III

USE OF FORECLOSED ALLEGATIONS WAS IMPROPER

Respondent does not try to defend the district court's imposition of further discipline based on the allegations in the *Mowen* case, which were the basis of a censure issued by the district court even before the state disbarment proceedings began and which were explicitly precluded from future use in "other proceedings."[2] Respondent asserts that the charges relating to the *Krieger* case were so serious that petitioner's suspension may be sustained on that basis alone, and respondent claims that the procedural issues raised would make no conceivable difference to the resolution of those charges.

But the state court's rationale for disbarring petitioner rested, according to repeated statements made by the court, on both the *Mowen* and *Krieger* violations. The Appellate Division asserted that its conclusion was based on what it called a "pattern of professional misconduct persisted in . . . for at least a decade" (Pet. App. 37a) — a characterization impossible to support if the *Mowen* charges are disregarded. Only in reliance on this "pattern" did the appellate court take the unusual step of increasing the sanction of a two-year suspension recommended by the referee.

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[2] Respondent insists mistakenly on calling this resolution a "plea bargain." In fact, it reflected the conclusion of the district court grievance committee that the one *Mowen* charge that petitioner had freely admitted from the outset of the grievance proceedings (*i.e.*, that an affidavit he had submitted to the court should have indicated that certain matters stated were matters of belief rather than actual knowledge) was the *only* allegation sufficiently supported by the evidence, and that the more serious charges were not sustainable.

More importantly, respondent overlooks the fact that only one of the *Krieger* charges was identified by the New York state court as being serious enough to require disbarment rather than the suspension recommended by the referee. That charge — subornation of perjury — was not only one of the most factually contested issues in the case, but it was also the allegation on which petitioner had previously been *acquitted* in a criminal trial turning on proof beyond a reasonable doubt.[3] Thus, the one charge on which petitioner's disbarment rests (if, as both respondent and the Second Circuit conceded, the *Mowen* charges may not be considered) is the one charge where the standard of proof was demonstrably dispositive.

In this case, petitioner was disbarred even though the Southern District's grievance committee and its investigating attorney, in 1984-86, and a 12-person state-court jury in New York, in 1988, had reviewed the charges against him and found them lacking, simply because a single state-court referee later found otherwise on the same body of evidence by applying a mere preponderance standard of proof. Respondent's glib assertion that the issues raised by

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[3] The remaining *Krieger* charges were much more technical and less serious. They included, for example, (1) the charge that a witness had been paid $250 for his time testifying when his daily earnings were only $150, (2) the charge that petitioner failed to correct a witness who testified falsely on cross-examination that the sportcoat he was wearing had not been purchased for him, and (3) the charge that petitioner had inadequately supervised an investigator and entered into a so-called "fee splitting" agreement with the same investigator. (The agreement actually provided that the investigator would receive one-half his hourly fee at the time services were performed and the remainder in the event of a judgment for petitioner's client.) Whether petitioner's conduct in these areas was unethical was vigorously contested, with petitioner presenting expert testimony from Professor Geoffrey Hazard, the Reporter of the ABA Model Rules of Disciplinary Enforcement, that his conduct was proper.

petitioner are merely academic and that his disbarment would be a foregone conclusion regardless of the procedural protections afforded him are belied by the record and by the history of this case.

CONCLUSION

Petitioner's professional life has been extinguished on the basis of preponderance-of-the-evidence findings made in a state proceeding after a sharply contested hearing. This is the archetypal case of a factual record on which the burden of proof makes a dispositive difference. If the correct federal standard had been applied, petitioner would not have been disbarred.

For the foregoing reasons and those set forth in our petition, a writ of certiorari should be granted.

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